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FROM THE EDITOR:

Prosecutors Leap Defenders on Delivery of Services. Pursuant to the passage of enabling legislation, 1996 House Bill 160, $1,440,400 in fiscal year 1996-97 and $2,091,300 in fiscal year 1997-98 from the General Fund was appropriated to allow 22 part-time Commonwealth Attorneys to become full-time. Conversion of part-time Commonwealth At-torneys to full-time status improved the efficiency of the prosecution of criminal cases in Kentucky. As a result, today 64 counties are served by full-time Commonwealth Attorneys. Only 47 counties are covered by full-time public defenders. DPA has fallen substantially behind Kentucky prosecutors in providing representation through *full-time* professionals.

DPA Full-Time Plan. DPA's full-time plan to catch up to full-time prosecutors has been announced by the Public Advocate, and is carried in this issue.

***Morton* Policy.** What happens when you are retained by a 3rd party to represent an indigent and there's no money for experts or other resources? We look at that vexing problem in this issue.

Edward C. Monahan,
Editor, The Advocate

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Full-Time Delivery of Criminal Justice Services in Kentucky Favors Prosecutors

Judges and Law Enforcement Officers provide their services almost exclusively through the use of full-time, not contract, professionals. This increases their efficiency and effectiveness for their very critical jobs.

Prosecutors Leap Defenders on Delivery of Ser-vices. Pursuant to the passage of enabling legis-lation, 1996 House Bill 160, $1,440,400 in fiscal year 1996-97 and $2,091,300 in fiscal year 1997-98 from the General Fund was appropriated to al-low 22 part-time Commonwealth Attorneys to become full-time. Conversion of part-time Commonwealth Attorneys to full-time status im-proved the efficiency of the prosecution of crim-inal cases in Kentucky. As a result, today 64 counties are served by full-time Commonwealth Attorneys yet only 47 counties are covered by full-time public defenders. DPA has fallen sub-stantially behind Kentucky prosecutors in pro-viding representation through *full-time* professionals.

Funding Advantage for Kentucky Prosecutors Inhibits Effective Representation by Kentucky Defenders

Statewide funding for public defender cases is $153 per case and $3.54 per capita. Kentucky's 91,600 indigent defense cases at the trial, appellate and post-conviction levels are being done for an average of $153 per case, less than the cost of an eye exam and a pair of eye glasses.

This is only $3.54 per capita. While this is quite a bargain for the taxpayers, it also implicates serious problems in representing all DPA clients adequately.

Funding inequity is large. Kentucky's statewide prosecutorial services are being funded at a sub-stantially higher level than Kentucky's public defender services. This disparity, which exceeds 3-1, substantially inhibits the efficiency and effectiveness of public defender services state-wide. Funds allocated for 1997-1998 are:

Public Advocacy	$17,077,500
Attorney General, Commonwealth Attorneys, County Attorneys	$53,678,300

Kentucky funding at the bottom nationally. President of *The Spangenberg Group*, West Newton, Massachusetts, **Robert Spangenberg**, has compiled 50-state national data on the expen-diture and caseload for indigent defense since 1982. Mr. Spangenberg states that the most recent data available in FY 96 places Kentucky at or near the bottom in both per capita funding and per case funding. He further states that Kentucky's ranking has continued to fall to a level lower than reported in the first national data published in 1982. At $127 per trial level case, Kentucky is now last nationally in this

category.

47 Counties Served by Full-Time Defenders

64 Counties Served by Full-Time Prosecutors

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DPA Plan for Increase in Full-Time Offices

It is one of my primary goals to increase the access to high quality coun-sel to indigents accused of crimes during my four year tenure. The Depart-ment of Public Advocacy has created a plan to insure the delivery of ser-vices at the trial level will be provided by full-time attorneys in 85% - 90% of the cases by 2000. The details and rationale for this plan follow:

I. Right to Counsel

The delivery of indigent criminal defense trial level services is controlled by the Constitutions of the United States and the Commonwealth of Kentucky.

The Sixth Amendment to the United States Con-stitution states that in "all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

In 1938, the United States Supreme Court stated that the right to the assistance of counsel was "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

Twenty-five years later, the Court clearly ex-tended this "fundamental human right" to poor people in the United States in the landmark deci-sion of *Gideon v. Wainwright*, 372 U.S. 335 (1963). There the Court recognized that the "noble ideal [of the right to the assistance of counsel] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.* 9 L.Ed. 2d at 805.

A series of United States Supreme Court decisions further explained this "noble ideal." In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended *Gideon* to misdemeanor cases. *Scott v. Illinois*, 440 U.S. 367 (1979) later held counsel need not be provided where incarcera-

tion, while authorized, is not actually imposed.

Section Eleven of the Kentucky Constitution was adopted in 1891, and states that "[i]n all criminal prosecutions the accused has the right to be heard by himself and counsel."

Kentucky guaranteed the right of the poor per-son to counsel when charged with a felony long before this right was recognized nationally. In *Gholson v. Commonwealth*, 212 S.W.2d 537 (Ky. 1948), the Court held that an attorney must be appointed for a person charged with a felony who is too poor to hire his or her own counsel.

II. History of KRS Chapter 31

In 1970, in *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970), the Kentucky Supreme Court stated that "since the providing of counsel for indigent defendants in criminal prosecutions in the state courts is an obligation imposed on the state by the constitutions it would appear that the pay-ment of reasonable compensation to such counsel would be in the category of an **essential governmental expense**. If so, the lack of an appropria-tion would not be a bar to a judicial order for payment." *Id.* at 632.

Two years later, the Court held that attorneys could not be required without compensation to represent indigents accused of crimes. *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972).

In 1972, in response to *Jones*, *Bradshaw*, and previous decisions, the legislature enacted KRS Chapter 31. This statute created a statewide public defender system to represent indigents accused of crimes and mental states.

Kentucky law now reads that a needy person "who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled: (a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled." KRS 31.110(1)(a). A "serious crime" includes felonies, misde-meanors "or offense any penalty for which in-cludes the possibility of confinement or a fine of five hundred dollars ($500) or more; (c) Any legal action which could result in the detainment of a defendant; and (d) An act that, but for the age of the person involved, would otherwise be a serious crime." KRS 31.100(4)(a)-(d).

Kentucky Supreme Court criminal rules buttress the rights of poor persons to counsel when charged with a crime. RCr 3.05(2) states that "[i]f the crime of which the defendant is charged is punishable by confinement and he is financially unable to employ counsel, the judge shall appoint counsel to represent him unless he elects to proceed without counsel."

III. History of Trial Level Defender Delivery Systems in Kentucky

After the promulgation of KRS Chapter 31 in 1972, the Department of Public Advocacy began to breathe life into the Sixth Amendment, Section Eleven, and the new public defender statute. The problems DPA was facing were great. First, Ken-tucky was one of the poorest states in the coun-try. While there were significant urban areas, there was an even larger rural population, with many counties sparsely populated. Many of these rural counties were characterized by con-centrated and significant social problems, including poverty, illiteracy, poor housing, unem-ployment, stagnant and declining populations.

The Department of Public Advocacy began in 1972-1977 to organize the public defender system almost from scratch. Assigned counsel and con-tract systems were organized in the great major-ity of the counties. Different funding formulas were attempted, using $14,000 per circuit, and $.40 per capita, for example. Many private law-yers became part of the predominantly part-time public defender system in Kentucky.

There was one full time office in Kentucky at the time of the enactment of KRS Chapter 31. This was located in Jefferson County, which had organized a full time public defender office prior to the statewide system being established.

At the same time, the public defender system in Lexington was part-time. Fayette County Legal Aid featured an active local board, and numerous part-time public defenders, many of whom later would ascend to the bench, the Commonwealth's and County Attorney's offices, and the legislature. This office eventually converted to full-time status in the late 1970s.

Two full time offices in rural Kentucky also be-gan during the early days of Chapter 31. In Boyd County, the participation by the local government and industry resulted in a full-time office beginning in Ashland. And in 1976, the first state-run full time office was established in Paducah when problems developed with the local public defender system.

Difficulties with the early system were soon apparent. Funding was not adequate for the caseload. Money for assigned counsel was unpredictable and often over the budgeted amount. Budgeting was difficult because hourly payment to private attorneys was hard to predict. Thus, in numerous years in the late 1970's, budget over-runs were common. Contract systems were troubled as well. Money there was also inadequate, and county fiscal courts, which had been envisioned in the statute as significant financial contributors to the system, contributed sporadically at best, with some notable exceptions. Further, attorneys were often inexperienced and untrained, turnover was high, and management, particularly at the local level, was almost non-existent. With 120 counties, the public defender system was mostly a patchwork of inconsistent quality.

While the problems that existed were statewide, they were more acute in the Appalachian coun-ties. This part of the state had then as now an extraordinary poverty rate. The crime rate was also high. Social problems were immense and intractable. In many of the counties, the numbers of lawyers available to work as part-time public defenders were minimal or nonexistent. As a

result, DPA secured grants from the Law Enforcement Assistance Administration in 1977 and 1978 to open full-time offices in the eastern part of the state.

Five offices were established initially in multi-county areas surrounding London, Winchester, Hazard, Pikeville, Somerset. Other offices in Harlan and Barbourville were prepared to begin. However, in the early 1980s the first of many budgetary crises in state government resulted in the last two of these offices never opening. Further, the office in Winchester was closed for similar reasons.

In 1981, a study of these new Appalachian offices was conducted by ABT Associates. They found that this delivery system improved the provision of services as compared to the previous assigned counsel system. (Pg. 46-47). They found that defendants previously unrepresented were now represented. The study noted that the offices had received the overwhelming endorsement of the entire service region, including judges and prosecutors (Pp. 66). As a result, the study recommended the legislature fund what was known as SEPAR. They also recommended that additional funding was "urgently required."

In 1981, Prof. Norman Lefstein in *Criminal Defense Services for the Poor*, an ABA Standing Committee on Legal Aid and Indigent Defendants' document, stated that "There is mounting evidence that the financial problems of defense services are approaching crisis pro-portions." This crisis was nowhere more prevalent that in Kentucky. Supplemental appropriations to meet the cost overruns in DPA had been required in 1978 ($185,000), 1979 ($200,000), 1980 ($750,000), and 1982 ($713,300) to meet the out-of-control costs of the assigned/contract system then in place. The establishment of the four full-time offices in Appalachian counties was not adequate to deal with what was a statewide problem.

By 1981, some areas of the state were in acute crisis. One notable area was in the Red River Gorge area. There were insufficient numbers of lawyers available to represent indigents, as a result of which many accused were spending months in jail without counsel. The Public Advocate was threatened with contempt for his failure to provide counsel in that area.

A significant change in providing representation occurred in 1982, when the assigned counsel method of delivery was eliminated by statute, due to the out-of-control and unmanageable nature of this method of delivery. It was replaced mostly by the fixed-cost contract method of delivery, whereby DPA contracted for a year with one or more attorneys to handle all trial level cases.

In response to these problems, in 1982 a plan was proposed by DPA, and accepted and funded by the 1982 legislature. In that plan, seven new offices were to open in 1983 to cover 26 counties in FY 83. In 1984, an additional six offices were funded to open to cover an additional thirty counties. By the end of 1984, DPA would have had 25 offices covering 89 counties with 192 people on staff. The remaining 28 counties would have been covered with assigned counsel and contracts.

Following the funding of this plan, DPA staff began to try to provide staff and space for these new offices. Attorneys were hired, and offices were in the process of being leased. However, again state budgetary problems occurred, and the positions and money were lost. A historic opportunity to establish a predominantly full-time system was lost.

However, some offices would open in the 1980s despite the budget problems. Three of the proposed offices were opened in 1982, in Morehead, Hopkinsville, and Stanton. An office had been opened the previous year in LaGrange in the Reformatory with little expenditure for overhead. In Richmond, an office was opened in 1984 when the bar would no longer provide services there. That same year a second prison office was opened in the new Northpoint prison.

Additional offices opened during the 1990s, again in response to crises in both delivery and funding. When the private lawyers would no longer participate in the Frankfort public defender system, an office opened there, located in our central office.

An office was opened in Kenton County in 1995 after years of underfunding and pro-rating of fees. That same year, an office opened in Madisonville, allowing for better services to a large county which had previously been served by the Hopkinsville Office. An office opened in Elizabethtown in 1995 in order to serve contract counties. Finally, in 1996, again in response to a crisis in services, an office was opened in Henderson.

One other development in the delivery of trial level services occurred during the 1980s and 1990s. Providing counsel in capital cases has long been quite difficult, particularly in contract counties. There, a capital case virtually closed down the private practice of the part-time defender. In the busy field office where caseloads often exceed 400-500 cases per lawyer, a capital case had serious ramifications for the entire field office, stretching scarce resources to the breaking point. In recognition of these facts, DPA started the Capital Trial Unit in the 1980s, which provides counsel in as many serious capital cases across the state as possible.

During the 1980s, the urban public defender offices had grown as well. The Jefferson County Public Defender's Office caseload burgeoned, and the system struggled to keep pace with limited funds. The Fayette Legal Aid office converted to full-time from its previous part-time delivery method.

Today, KRS Chapter 31 provides for essentially two methods of delivering trial level counsel. The DPA may contract with an attorney or attorneys or an organization of attorneys who will provide services to indigents. In the alternative, the DPA may provide a full time office to provide similar services. See generally KRS 31.065.

76% of public defender cases are being handled by full-time lawyers, using 1995-96 figures. 18 full-time offices are in place in 47 counties in both urban and rural Kentucky providing services

in most of the concentrated population centers. In 1995-1996, the funding per case in these offices was $132 per case.

At the same time, 72 counties were being served by part-time lawyers who were under contracts with the DPA. In 1995-96, lawyers in these coun-ties represented 24% of the cases statewide at $109 per case. Kentucky is only one of three states where the primary method of delivery, at least in terms of numbers of counties, is the contract method. Hailstorks, Addie; Broderick, Mary; Lyons, Clinton, *Statewide Defender Pro-grams: The Lay of the Land*, NLADA, Washington, D.C. (1992).

In 1996, the prosecution received significant funding to enable many Commonwealth's Attorneys to adopt the full-time method. Today, 64 counties are served by full-time Commonwealth's Attorneys, compared to 47 counties covered by full-time public defenders.

At the same time, the original vision of KRS Chapter 31 remained strong. Kentucky is fortunate to have a statewide public defender system. This system allows for central coordination, planning, consistency, resources allocated according to demonstrated need, flexibility, and many other benefits. The structure created in the enabling statute enables DPA to tackle many of its problems without additional legislation.

IV. The Present Problem

The 1980s and 1990s have witnessed an increase in crime, including increasing arrests as a result of the War on Drugs, harsher sentencing laws from DUI to violent offender statutes, and an explosion in prison population. Even though the violent crime rate has just recently begun to decline, between 1986-1996, DPA experienced a 42% increase in caseload. As a result, increases in funding in 1994, in addition to two statutory revenue sources, did not increase sufficiently the amount of money made available to indigent defense.

The only solace was that Kentucky was not alone -- we were part of a national trend. This trend led the ABA's Special Committee on Funding the Justice System to state in its report, *Funding the Justice System: A Call to Action* (Aug. 1992), to state that "the American justice system is under siege and its very existence is threatened as never before. This threat arises not from a foreign power, not through an authoritarian domestic regime, nor from lingering racial intolerance in our society. The justice system in 1992, and the very notion of justice in the United States, is threatened by a lack of adequate resources to operate the very system which has protected and extended our rights for more than two centuries."

While funding for the entire justice system has been stagnant, funding for public defense has been wholly inadequate. "While all components of the criminal justice system are suffering from the lack of adequate resources, the current level of funding for a majority of the indigent defense programs around the country has reached the crisis level and threatens the effective

implementation of the Sixth Amendment right to counsel." ABA Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis, *The Indigent Defense Crisis* (1993).

Today, Kentucky continues to fund its public defender system at among the lowest rates in the nation, down from previous years. A Bureau of Justice Statistics Special Report noted that in 1982, the average cost per case was $196. Kentucky came in 32nd at that time, at $168 per case. Kentucky trial level public defenders 15 years later were delivering services at $127 per case, continuing to be on of the lowest public defender systems in the nation. This occurred despite a general fund increase in 1994 and two additional revenue sources, the administrative fee and the DUI service fee. Of all Kentucky criminal justice dollars, including the judiciary, prosecution, state police, corrections, and defense, DPA was allotted only 2.8%, while the prosecution received 7.8%.

The results of this underfunding are dramatic. In Jefferson County, attorneys continue to struggle with caseloads of almost 800 per lawyer. In Fayette County, the lawyers carry caseloads of almost 600 per lawyer, with only one investigator for 15 lawyers. In four of DPA's full time offices, attorneys were burdened with caseloads in excess of over 500 cases per attorney.

In addition, in November of 1996, the Children's Law Center at Northern Kentucky University Law School issued a report on the state of juvenile representation in Kentucky. Among their findings were that the DPA was not doing enough in the area of juvenile law. Specifically, the report stated that numerous juveniles were unrepresented, inexperienced lawyers were representing juveniles in DPA's full-time offices, and both inexperienced and untrained lawyers were representing juveniles in contract counties.

V. The Justification for Full-Time Offices

The most cost-effective means of providing high quality trial services is the full-time delivery method in partnership with the private bar. My goal is for 85-90% of the indigent cases to be handled by full-time offices.

This method of delivery has been recommended by numerous authorities in this field over the two decades. The Standards for Defender Services prepared by NLADA recommends that a "full-time defender organization should be available for all communities, rural or metropolitan, as the preferred method of supplying legal services."

The 1983 ABA Standards for Criminal Justice, Chapter 5, *Providing Defense Services*, Standard 5-1.2 recommends that each "jurisdiction should provide for the services of a full-time defender organization and coordinated assigned-counsel system involving substantial participation of the private bar." The Commentary to this Standard explicitly affirms the emphasis on full-time delivery in partnership with the private bar as discussed here. "When adequately funded and

staffed, defender organizations employing full-time personnel are capable of providing excellent defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested."

The 1991 ABA Standards likewise support the full-time delivery method. In 5-1.2(a), the standards recommend that "each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas." In 5-1.2(c), the standards state that "conditions may make it preferable to create a statewide system of defense."

The 1993 ABA Standards for Criminal Justice, *Providing Defense Services*, Standard 5-1.2 likewise states that "each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas."

The Commentary to the most recent ABA standards explicitly affirms this system. "The American Bar Association does not endorse the use of contracts for services as a viable, separate, 'stand alone' component for the delivery of defense services. Instead, the structure proposed here creates a hierarchy of models. The primary component in every jurisdiction should be a public defender office, where conditions permit."

The second component, which assures private bar participation, "may occur through a contract for services, which may be part of the larger, co-ordinated system." Commentary to ABA Standard 5-1.2, at 6-7. Standard 5-1.2(b) explicitly states that every "system should include the active and substantial participation of the private bar. That participation should be through a co-ordinated assigned-counsel system and may also include contracts for services."

The rationale for the emphasis on the full-time method of delivery is as follows:

1. There continues to be a lower funding-per case in contract counties than in the full-time counties. The obvious way to rectify that is to add resources to those counties. Converting a number of high caseload contract counties to full-time will allow for the infusion of addi-tional funds which should raise the quality of services.

2. When public funds are spent, it is vital that there be accountability. An infusion of funds into contract counties without accountability cannot be justified. Converting counties to the full-time method will allow for additional public dollars to be dedicated to those counties while at the same time accounting for the expenditure of the funds to the General As-sembly.

3. The full-time method creates a structure for providing services which lasts over time. The contract delivery method is often highly dependent upon one or two private lawyers wanting to continue to do the work. Often, new lawyers stop doing public defender work after their practices grow. When they stop, there is no structure in place to continue the services, and as a result, there is a disruption which effects the quality of services.

4. The full-time method ensures that attorneys involved in defending cases are fully trained. There is no existing method for ensuring training for contract public defenders. Training is now on a volunteer ad hoc basis. In contrast, DPA's full-time lawyers are required to attend several weeks of new attorney training in district court, juvenile, mental health, and circuit court practice. This is followed by a DUI Trial Practice Institute, a felony TPI, and a death penalty TPI, all of which last a week.

5. There is better management in the full-time office. Recruiting for excellence can occur. A directing attorney makes case assignments based upon experience and training. Case re-view of cases prior to going to trial is be-coming the rule rather than the exception. If an attorney is not serving his/her clients well, discipline can result. None of this management is practically possible in the contract system.

6. Full-time delivery allows for statewide planning and flexibility of allocating resources based on need and priorities, rather than having multiple, uncoordinated, piecemeal, inconsistent solutions.

7. Commonwealth's Attorneys are now predominantly full-time. They have recognized that having full-time attorneys is the superior method for providing high-quality legal services.

8. Most other components of the criminal justice system, from judges, to law enforcement, to probation and parole and court designated workers, are full-time salaried employees. This recognizes that this is the superior method for providing for this variety of criminal justice activities.

VI. DPA's Plan for 1997-2000

The DPA staff and contract defenders , from the individual offices through management, have been engaged in strategic planning for the past 6 months. As a result of this, a plan has been developed for the delivery of trial services through 2000. This plan, if adopted, will achieve the goal of providing services through the full-time delivery method in the great majority of cases, with a continued significant partnership with the private bar. The plan is as follows:

1997-1998

1. An office will be opened in Bell County in January of 1998.

2. Marion and Washington Counties will be covered by the Elizabethtown Office.

3. Montgomery County will be covered by the Morehead Office.

4. Attorneys are being added to London, Pike-ville, and Richmond to meet the increasing caseload demands there.

1998-1999

1. An office will be opened in Daviess County in January of 1999.

2. An office will be opened in Campbellsville to cover Taylor, Adair, and Green Counties in January of 1999.

3. Existing full-time offices will begin to cover Casey, Union, Webster, Muhlenberg, Hart, Larue, Scott, Anderson, and Harlan Counties in July of 1998.

1999-2000

1. An office will be opened in Paintsville to cover Johnson, Martin, Lawrence, and Magoffin Counties in July of 1999.

2. An office will be opened in Maysville to cover Bracken, Mason, and Fleming in July of 1999.

3. An office will be opened in Warren County in January of 2000.

If adopted, by 2000, DPA will be delivering trial level services in 67 counties through the full-time delivery method. 53 counties will continue to be served through the contract method. Based upon 1995-96 figures, by 2000, 89% of the caseload will be handled in full-time offices, while 11% of the caseload will be handled by contract public defenders. Most importantly, a structure will then be in place that can guarantee high quality delivery of trial level services to indigents accused of crimes into the future.

VII. Continued Role of the Private Bar

The private bar plays a highly significant role in the Kentucky public defender system at the present time. Their role will shift, but at the same time remain undiminished in the future. The ABA Standards for Criminal Justice, *Providing Defense Services*, Standard 5-1.2(b) states that "[e]very system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services."

This plan anticipates that 54 of Kentucky's counties would continue to be served through the contract method of delivery. While DPA agrees with the Commentary to the ABA Stand-ards that "contracts for services" should not be viewed as a "viable, separate, 'stand-alone' component for the delivery of defense services"...and that the "primary component in every jurisdiction should be a public defender office," that does not appear to be feasible for many years. Thus, it is clear that many Kentucky counties will continue to be served by the contract method of delivery.

The private bar will also participate significantly in this plan by joining panels of attorneys to provide representation in conflict of interest situations, usually in full-time office counties. This private bar involvement will often be 10-20% of the caseload of the full-time office.

VIII. Conclusion

DPA has come a long way since its inception in 1972. In 1995-1996, 87,000 clients were repre-sented at the trial level. The challenge is to put into place a structure which will guarantee high quality indigent defense into the next century.

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Effective Appellate Advocacy

In preparation for this presentation I asked each of my associates on the Court what they thought was the biggest mistake advocates make in appellate work, both written and spoken. The responses I received were very similar to my own thoughts on the matter and, thus, I present them to you.

Errors in Brief Writing: A Primer

1. **Organization.** The number one mistake advocates make in brief writing is best described as failure to organize effectively. This failure is the result of poor analysis of the issues, and taking a broad approach as opposed to narrow. Specifically determine what it is you are trying to

accomplish, be it a trial with a different jury, same evidence, a new trial with certain evidence ordered suppressed, or a new hearing to determine admissibility of something. If you know exactly what relief it is your arguments, if deemed valid, entitle you to, you will more easily tailor your argument effectively.

a. **The Facts.**

Too often it is obvious from reading the brief that the factual statement has been dictated as the record is reviewed, which, in general, is a good idea because you can easily keep track of the cites to the record. What you have when you finish dictating is a rough draft; it *must* then be edited for clarity. Witnesses often testify about matters that, while important in the context of the trial, are irrelevant to the actual issues that will be argued on appeal. Usually, the chronological order of the witnesses has little to do with the chronological order of the events giving rise to the criminal charge. If more that one witness testifies to a specific fact important to your appeal, those witnesses' testimony should be set forth in close proximity to one another even if they were days apart on the stand. Additionally, there are frequently facts that do not belong with the narrative of the alleged crime. For example, the issue of

whether a search of the defendant's home (not the crime scene) was validly conducted, may have its own separate set of facts, unconnected to the criminal event. The same is true of the scenario surrounding the giving of a statement sought to be suppressed. Those facts should be separated and clearly delineated through the use of headings or subtitles so that they can be easily referred back to while reading the argument.

Once you have determined what issues are to be raised, the facts should be edited with an eye to highlighting the areas that support your argument. Always keep in mind that the page limitations provided in the rules should not be considered a target to reach. The idea is to keep it brief, consistent with good advocacy.

b. **The Issues.**

Ideally, each issue will be summarized in a sentence or two in an introductory paragraph. Preservation, or the lack thereof, should also be noted (or admitted) up front as required by the rules. If there are alternate grounds for the granting of relief, this can also be noted as part of the introductory statement. This structure gives the reader a preview of what to expect.

While it always interesting to read a historical review of the development of the law of, for instance, search and seizure as it relates to automobile searches incident to arrest, such is neither an efficient use of limited space nor an effective argument for reversal of a

particular case. I believe I can state with some confidence that the Court has a basic familiarity with search and seizure law and does not need a detailed primer. That being said, keep your argument concise and to the point, using short paragraphs and appropriate case citation. String citation is boring visually and unhelpful.

If alternate grounds are to be presented, make sure it is clear where one argument ends and the other starts.

Preservation issues should be addressed under a separate subheading within your argument. The grounds for the objection should be stated briefly, along with the trial court's ruling. If unpreserved, state more than the

obvious argument that this is a palpable error. Tell the court why it is so, if possible.

2. **The Conclusion.** It seems rather simplistic to state that you need to say what relief you believe you are entitled to at the end of your brief, but you do. If you believe that you should receive a new trial at which certain evidence is suppressed, say so. If you are entitled a new trial with a fresh determination of the admissibility of some evidence, set it out. If you are clear on what it is you want or believe you are entitled to, it brings your whole argument into focus. On more than one occasion I have finished reading a brief and known what the writer thinks went wrong in the proceeding, but have been unsure exactly what she or he thinks I ought to do about it.

3. **The Appendix.** I used to say that appendices were underused, and that people didn't realize what a valuable tool of appellate advocacy they were. I am still of that opinion but am now seeing appendices misused as often as they are ignored.

DO put in your appendix:

a. The trial court judgment appealed from.

b. The opinion by the Court of Appeals, if any.

c. Significant orders, whether written or copies of the transcript, entered by the trial court that relate to the issues raised. (EX: Findings in support of order denying motion to suppress.)

d. Other important stuff from the record as long as it isn't too long.

YOUR APPENDIX SHOULD NOT BE LONGER THAN YOUR BRIEF!

DO NOT put in your appendix:

a. Long portions of the transcript. If it's more than two or three pages long, restrain yourself.

b. Photocopies of pictures admitted into evidence. They do not copy well; most of the time you can't make out what they are supposed to be. We have the record and can (and will) look at the actual pictures.

c. Copies of cases. I used to tell people to put out-of-state cases that have been cited in the appendix, but now since these can be retrieved so easily via WestLaw or Lexis, save the paper. (Let it come out of my budget, not yours.) The same is true of regulations or other foreign authority. The State Law Library will provide our office with any statutes or regs we need within 24 to 48 hours.

4. **Miscellaneous.** The most important thing to have to ensure a good brief is time. I know how overloaded you are at the appellate level, and I am preaching to the choir. You need to have time to think the thing through, time to edit and improve, time to research and update as time passes.

Do proofread and cite check. If there is time in your impossible schedule, let the brief sit for twenty-four hours after you have finished it, but before it is copied and bound in covers, to reread for clarity. You will probably find fuzzy statements or confusing sentences that will take you by surprise. Proofread again.

ORAL ARGUMENT

Don't underestimate the power of a good oral argument. It can make or break a case. It is perhaps unfortunate that the process is called argument, because the most effective presentations are the ones which draw the bench into a discussion of the issues. You know that you have made the Court think twice about what you are presenting when there is a lively exchange going on. Contrary to what some believe, the purpose of oral argument is to get more information about the subject at hand, not rake counsel over the coals or embarrass anyone.

Just as writing the brief, preparation for your oral argument requires organization. Sometimes the Court will grant an argument on limited issues, but most of the time you simply get an order scheduling the case sometime in the next two to three months. There are a number of matters you should immediately place on you calendar, things to do and time to set aside for preparation.

1. **Your Calendar.** When you get the order scheduling oral argument, immediately calculate and place on your calendar the following:

a. Date and time of argument

b. A time to update your research and prepare a notice of additional authority in a timely fashion.

c. Time to review the file and prepare for argument.

2. **Preparation.** You *have* to have time to review the record and refresh your memory as to the facts which gave rise to the charges, the procedural history, any important evidentiary rulings or other trial events that are likely to come up during arguments, and *your brief*. Remember that the Court will be using our copies as a road map to your argument. Mine is frequently marked up and tabbed with questions that have come to mind as I prepared for argument.

You will also need to remember that we have not taken a detailed look at the record prior to argument. In fact, in most cases, we haven't looked at it at all. That will come after the argument. So when we ask factual questions, we have either not understood what was in the brief or questions have been raised as to the brief's accuracy. If the AG contests the correctness of your brief, you can bet that information will be double-checked before the opinion is written.

3. **The Argument.** Be on time. We really don't care how you are dressed.

Before the Court comes to the bench, Susan Clary, the Supreme Court Clerk, will ask for your name, determine who is going to present the argument and, if you are representing the Appellant, how much of your 15 minutes you wish to reserve for your rebuttal. If there is to be a Special Justice on your case, you will be reminded of that fact.

Begin your argument by introducing yourself to the Court, especially if you have not had an argument recently. There has been so much turnover on the bench that even those of you who practice regularly before the Supreme Court may not be known to all Justices. The Justices' names are noted in order on the podium so that you will know who is asking the questions.

Fifteen minutes may seem like a long time, but it isn't really. Don't get bogged down in the facts of your case at the expense of your legal arguments. Just last month, I saw an

attorney use nine of his eleven minutes explaining the facts of his case, leaving only two minutes to sketch his legal argument. His rebuttal time was then used to respond to Appellee's points rather than make his own.

The Chief Justice keeps the clock. During the time that a question is being propounded from the bench and responded to, the clock is turned off. That's why a fifteen-minute argument can actually last twenty-five or even thirty minutes.

Listen to the questions. It's surprising how often people don't appear to. If you aren't quite sure what the Justice wants to know, don't be shy about asking for clarification of the question. Failure to do so may make you simply seem nonresponsive. The questions asked can sometimes indicate what issues are causing the most discussion in chambers. If you can't answer the question, or are not familiar with whatever authority the Justice is bringing up in the query, say so.

Don't feel obliged to laugh at the bad jokes that sometimes come from the bench, even if I make them.

When making your argument, stay in the vicinity of the podium. The cameras are voice-activated and the one on you is pointed at the podium. If you move away from the podium, the video becomes useless. (I'll explain the importance of the video later.)

If you simply must use your nifty exhibits, have an associate who can change them around, if necessary. If there isn't someone to help, at least stop talking when you move away from the podium. Better yet, don't use them at all, unless absolutely necessary. It is a poorly concealed secret that serving on the Supreme Court causes your eyesight to deteriorate. Most of the time the poster-size blow-ups of the statutes or statements of witnesses are completely illegible from where we sit.

Maps or diagrams can sometimes be understood visually, but only by the Justices closest to the exhibit. It's better to make these things a part of your appendix so we can look at them in the course of the argument.

Listen to the argument of and the questions asked of the AG. If appropriate, be ready to answer the same questions yourself. If there was a question asked during your argument that you were unsure of, you may be able to find the answer or information during the Appellee's argument to use as part of your rebuttal presentation.

It is usually a bad idea to reserve more than three or four minutes for rebuttal. You may think that you can say everything in six or seven minutes, but you're probably wrong. If you don't need all your rebuttal time, don't hesitate to sit down early. We won't hold it against you.

4. **What happens next?** The Court leaves the bench and goes into conference about your case. The Chief Justice will usually set up what he regards as the main issues and then we will discuss each in turn, going around the table and casting a preliminary vote. When we are finished, a head count is taken, the majority determined, and the case assigned by the Chief Justice. The Justice receiving the case will then review the record and prepare a draft opinion, which is circulated via e-mail to the rest of the Court. It is at this point that the video becomes important. While we try, to varying degrees, to keep notes of the points made in oral argument and during conference discussion, the video of oral argument is an invaluable tool in developing a written opinion.

At the next conference week the case will be docketed and discussed and another vote taken on the draft. If there are dissenting votes, the dissenting Justices will determine who will write the dissent. The case will again be docketed when the dissent is circulated. Another vote will be taken during conference week and the case will either be rendered or passed for further action. No vote is final until rendition is directed.

5. **Petitions for Rehearing.** CR 76.32 governs petitions for rehearing. The standard for rehearing is set forth in (1)(b) and we adhere to it pretty consistently. There must be a showing that "the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto." Most frequently petitions are denied because the issues raised are simply rehashes of the original arguments on appeal, the resolution of which counsel disagrees with.

6. **Motions for Discretionary Review.** The Court considers approximately seven hundred motions for discretionary review every year, and grants between ten and fifteen percent. The odds, then, are against you. However, if a motion is granted in a criminal case, you can assume that we are interested in addressing an issue substantively, not just in correcting a possible error by the Court of Appeals. The fact that the Court of Appeals may have incorrectly resolved an issue is not necessarily enough to get a motion granted. If the result is deemed correct, though incorrectly reached, we are more likely to deny review and order the case unpublished, if appropriate. If the opinion was unpublished to begin with, we will simply deny review unless someone takes a strong interest in the issue. Even the best issue will be rejected if preservation is questionable.

7. **Miscellaneous.** I realize that you are overworked and that watching a video record is time-consuming, but do not wait until the last minute to file for an extension of time.

Do review the work of your contract counsel periodically; some of it is not stuff you would be proud of.

Proofread. Then proofread again.

Finally, be proud of the work that you do. Consistently, the best briefs and best arguments that the Supreme Court reads and hears, month after month, come from the Office of the Public Advocate.

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Justice Janet Stumbo is a native of Floyd County, Kentucky and a graduate of the University of Kentucky College of Law. Justice Stumbo has served as staff attorney to the late Judge Harris S. Howard of the Kentucky Court of Appeals; she's been in private practice with *Turner, Hall & Stumbo, PSC*; she served 3 years as Assistant County Attorney for Floyd County, sat on the Board of Directors of Appalachian Research and Defense Fund of Kentucky, Inc. from 1983 - 1989 and was Board Chair from 1984-1989. In 1989, Justice Stumbo became a partner in *Stumbo, DeRossett & Pillersdorf*. In November 1989, Justice Stumbo became the first woman from the 7th Judicial District to be elected to the Court of Appeals of Kentucky. Only the second woman on the Court, she was the first to be elected without first having been appointed. Justice Stumbo served four years with the Court of Appeals. In November 1993, Justice Stumbo became the first woman elected to the Supreme Court of Kentucky, again without first having been appointed, and was re-elected to a full 8 year term in 1996. She is the Chair of the Kentucky Supreme Court Civil Rules Committee. She was elected to the Morehead State University Alumni Association Hall of Fame in 1990, and received the Justice Award from the Kentucky Women Advocates in 1991. The latter award was given for her recognition of the use of evidence of spousal abuse as grounds for setting aside a settlement in a dissolution of marriage case, and for her support in creating a shelter for abused women in Floyd County. In 1995, she received an Outstanding Just Award from the Kentucky Women Advocates for her support of the adoption of gender fairness into state judicial language and was awarded the 1995 Bull's Eye Award by the Women in State Government Net-work. Justice Stumbo received the first Women Lawyers of Achievement Award, given by the Kentucky Bar Association for Women, in 1996. The award recognizes professional excellence in the practice of law and opening up the field for other women. Justice Stumbo co-authored the chapter on *Appeals of Workers' Compensation in Kentucky* (2d ed. 1996).

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Funds for Resources for Indigent Defendants Represented by Retained Counsel

Quality defense in the '90's requires substantial resources often including defense experts. In many cases experts are as important as counsel.

When an indigent is represented by retained counsel and the case demands an expert, investigator, or other resource who has the responsibility to pay for those resources?

Two different approaches are evident: either the state pays under a state statute or case holding or the indigent defendant has to turn the money up. The competing values involved in these two approaches include the client's desires, the state's fisc, and effective assistance of counsel.

The Defendant Pays. Highly committed advocates believe it is essential to discourage the harmful practice of marginal attorneys taking significant cases for small retainers and then providing minimal or inadequate representation. They argue that these unacceptable situations will be deterred by refusing to give the indigent defendant represented by a retained attorney any state funds for experts, investigators or other necessary resources. Those indigent defendants and those borderline attorneys should be left to fend for themselves, the argument goes, and they will soon realize that continuing this practice is problematic. Proponents of this approach believe the long range consequence is that the practice of doing this will stop if no resources are provided. The problem will be cured with the defender system having those cases from the start with the state funding the attorney and the resources under an indigent defense system. The state's interest is met because the indigent receives competent representation from public defenders with adequate resources at the trial, reducing or eliminating the need for protracted post-trial litigation.

The State Pays. On the other side of this dilemma are highly committed advocates who are convinced that clients have the right to choose to be represented by the attorney they prefer, if the client can somehow turn up the retainer from family or friends, even if the attorney is objectively marginal or inadequate. The argument continues that it is in the state's interest to encourage this retained representation because it saves money since the cost for the attorney representing the indigent is not paid for by the state. The state pays only the cost of experts, investigators and resources, which it would have to do anyway if the client were represented by

a public defender. Even though the state pays some money for resources, it saves money overall by not paying for the attorney. The public defender office is less burdened. The client has the attorney of his choice.

Analysis

Both sides have significant advantages and both arguments have negative consequences. An indigent represented by passable retained counsel of choice who is paid a wholly inadequate amount of money who does not receive state funds for resources will in all probability receive ineffective representation. The public defender system will likely inherit the case on appeal and post-conviction...hardly an overall cost saving to the public defender system. "Few attorneys can provide the requisite competent and zealous advocacy for indigent criminal defendants on a regular, recurring basis or in complex or lengthy criminal cases unless they are fairly compensated. The reason is obvious. A lawyer is no different from any other service provider. Over the long haul, an attorney can provide only the services that he or she has the time to perform. A lawyer's very limited time is purchased with money that covers overhead and provides a living. *Adequate compensation is essential to provide adequate representation.*" Monahan and Aprile, *Pro Bono Service in Criminal Cases is Neither Mandatory Nor Ethical*," ABA *Criminal Justice*, Vol. 5, No. 3 (Fall 1990) at 35, 38; see also, Monahan and Clark, *Coping with Excessive Workload*, Chapter 23 in ABA *Ethical Problems Facing the Criminal Defense Laywer* (1995).

On the other hand, many private attorneys will, despite the inadequate pay, do effective work which will provide indigents with competent representation. Other counsel will receive a fee in an amount that will allow them to represent the client competently if costs are provided for by the state. *See*, Michael Salnick, "*Effective Counsel for the (Almost) Indigent: Making the State Coffer Up*," *The Champion*, Vol. 13, No. 6 (July 1989) at 6 (This article provides practical litigation strategies for the "motion to declare defendant indigent for costs."). The probability of competent representation is likely to substantially increase if those retained counsel could access funds for defense experts, defense investigators and defense resources when representing an indigent. There is no way to prevent indigent clients from hiring counsel for an inadequate fee so it is in the state's interest to provide resources in order to increase the chance that the representation is competent and will not spawn endless collateral challenge. If the state pays for resources, it will also encourage more defendants who can pay for counsel themselves or find others to pay for counsel to access retained counsel and free up state resources for defender services. The two approaches each have substantial rationales to support them; however, the majority view is that the state pays. State payment for experts and resources allows clients to have the attorney they prefer and meets the public policy need to conserve state funds.

National Standards & Caselaw

The American Bar Association *Standards for Criminal Justice, Providing Defense Services* (3d ed. 1992) provide that resources should be supplied by the state not only for defender cases but also for indigents represented by retained counsel. *Standard* 5-1.4 states: "...*In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services*."

The Commentary to the Standard explains: "Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. This standard, like the Criminal Justice Act provisions noted above, authorizes supporting services to be made available to the clients of retained counsel who are unable to afford the required assistance. This means that the defense services program should include sufficient funding in its budget for such contingencies, and defense services funded through the courts should do likewise."

The Criminal Justice Act provision cited by the ABA, 18 U.S.C. ?3006A(e)(1), authorizes "services other than counsel" if the court finds "that the services are necessary and that the person is financially unable to obtain them...." The *CJA Guidelines*, ?3.01A, directs the court to "inquire into the fee arrangement" in ruling on a request by a defendant represented by retained counsel. 1996 U.S. App. Lexis (4th Cir. October 29, 1996).

A review of cases from ten jurisdictions over the last 17 years indicate clear national thought on this issue in line with this national ABA Standard. Courts across the nation which have decided this issue balance the equities and risks with a preference for providing state funding of experts, investigators and other necessary resources to the indigent being represented by retained counsel.

In ***Arnold v. Higa***, 600 P.2d 1383 (Hawaii 1979) the murder defendant was initially appointed counsel. Subsequently his parents employed counsel for him after the "previous counsel had exhausted the maximum allowable attorney's fee from the state." *Id.* at 1384. The Hawaii Supreme Court held that it was error to preclude the indigent defendant from eligibility for state funds to hire an investigator simply because he was represented by retained counsel. The statute did not limit funds for resources to only cases where counsel was appointed, and an indigent has the right to "effective assistance of counsel and to a fair and impartial trial." *Id.* at 1385.

The Court also held that a challenge to the failure of the trial judge to consider whether funds were necessary was an appropriate issue for a writ of prohibition. An appeal would not be an adequate remedy since the investigator was being sought to contact out of state witnesses. If the defendant is "forced to wait for a reversal on appeal to obtain an investigator, these

witnesses will be increasingly difficult to locate and their statements will be considerably less accurate and helpful to a just conclusion of this case." *Id.*

In ***Anderson v. Justice Court***, 100 Cal. Rptr. 274 (Cal.Ct.App. 1979) the indigent capital defendant had retained counsel who was being paid by friends and family. The Court reasoned that the "statute itself does not limit application to cases where counsel has been appointed but to 'the indigent defendant.'" *Id.* at 277. "It follows that the test of indigency for the purpose of funding investigators and experts is financial means to secure these services." *Id.*

In ***English v. Missildine***, 311 N.W.2d 292 (Iowa 1981) the indigent defendant was charged with third degree theft. His mother paid private counsel $800 and her son, the defendant, paid counsel $100. The private counsel sought public money for a handwriting analyst and deposition expenses.

The Iowa Rule of Criminal Procedure "does not distinguish between indigents who are represented by court-appointed and private counsel." *Id.* at 293. The Sixth Amendment right to effective assistance of counsel includes the right to "public payment for reasonably necessary investigative services." *Id.* at 293-94. "The Constitution does not limit the right to defendants represented by appointed or assigned counsel. The determinative question is the defendant's indigency." *Id.* at 294. "It would be strange if the Constitution required the government to furnish both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services." *Id.*

In ***State v. Manning***, 560 A.2d 693 (N.J. Super. 1989), *cert. denied* 569 A.2d 1351 (N.J. 1989) the Court looked to the statute on ancillary resources and found that it "nowhere conditions these services on the defendant first receiving legal services from the public defender." *Id.* at 698. The Court also considered "the increasingly overcrowded docket and insufficient resources, both monetary and personnel, of the office of the public defender limit the number of cases that office can handle effectively." *Id.* at 699. The court held that being represented by private counsel, whether *pro bono* or paid by a third party, does not deny the indigent access to state-funded ancillary resources. "Permitting the cost of legal services to be borne by a charitable attorney or a third party would relieve the State of the legal costs and use of personnel involved in such defenses." *Id.*

In ***Ex Parte Sanders***, 612 So.2d 1199 (Ala. 1993) the defendant, who was charged with robbery and kidnapping, was declared indigent and was appointed counsel. Two weeks later his family retained counsel for him and the appointed counsel withdrew. The trial judge denied the request for state funds to hire a ballistics expert since the defendant was represented by retained counsel. The Alabama Supreme Court held that the indigency of the defendant was the criteria under the statute for the eligibility of state funds for expert help, and money from third parties did not affect a defendant's indigency. "If the assets of friends and relatives who are not legally responsible for the defendant are not included in determining a defendant's

indigency, then the fact that a friend or relative pays for an indigent defendant's counsel should not be considered in determining whether the defendant is entitled to funds for expert assistance. The simple fact that the defendant's family, with no legal duty to do so, retained counsel for the defendant, does not bar the defendant from obtaining funds for expert assistance when the defendant shows that the expert assistance is necessary." *Id.* at 1201. See also *Dubose v. State*, 662 So.2d 1156 (Ala.Crim.App. 1995) where the court authorized funds for a DNA expert for the indigent defendant who used his family's money to hire counsel.

In ***Spain v. District Court of Tulsa Co.***, 882 P.2d 79 (Okla.Crim.App. 1994) the indigent defendant's parents mortgaged their house and retained counsel, paying $15,000 with $10,000-$40,000 additional obligation. The parents were unwilling to pay for funds for resources since they were not sure they would be able to pay all they were due to the attorneys. The defense attorneys ordered a transcript of the preliminary hearing at a cost of $800 and asked for reimbursement from the court since the defendant was indigent. The court refused since they were retained counsel. The attorneys then sought a writ of mandamus. The appellate court granted the writ determining that the defendant's indigency was the determiner of whether the government was obligated to provide costs and services. The "fact that Spain's parents were willing and able to retain counsel on his behalf has no bearing on Spain's status as an indigent, given his parents' unwillingness to provide any further financial assistance." *Id.* at 81.

In ***State v. Wilkes***, 455 S.E.2d 575 (W. Va. 1995) the indigent murder defendant's family paid for counsel from a bank loan and donations from their church. The trial court denied the request for funds for experts since the defendant was represented by private counsel. The Court concluded that "financial assistance provided by a third party which enables an indigent criminal defendant to have the benefit of private counsel is not relevant to the defendant's right to have expert assistance provided at public expense. A criminal defendant who qualifies as an indigent person is entitled to receive publicly funded expert assistance deemed essential to conducting an effective defense." *Id.* at 578. "The petitioner's family members have no obligation to finance the petitioner's defense, and any funds they provide have no effect on his status or being personally indigent." *Id.* at 577.

In ***Miller v. Smith***, 99 F.3d 120 (4th Cir. 1996) the defendant chose the services of *pro bono* representation rather than representation by the Maryland public defender office on his appeal of his felony conviction. The state court determined that the defendant must "apply to the public defender and be represented by, or refused representation, by that office before he can receive a free transcript." *Maryland v. Miller*, 651 A.2d 845, 849 (Md. 1994). The Fourth Circuit found this to violate due process and equal protection guarantees and granted the habeas.

The holdings in the cases from the above eight jurisdictions contrast with holdings from Delaware and Kentucky, although the continued viability of the Delaware and Kentucky holdings are suspect.

In ***Bailey v. State***, 438 A.2d 877 (Del. 1981) the Delaware Supreme Court held that there was no statutory authority to provide funds for an investigator to an indigent who managed through the resources of others to retain counsel. Significantly, the Court stated it was "aware that this result has its illogical aspect: thus an indigent defendant who relieves the public of the burden of representing him cannot secure investigator assistance which he can get (under the Public Defender Act) if he places the entire burden on the public." *Id*. at 878.

The Court went on to observe that its decision "may appear to be in conflict" with *Pendry v. State*, 367 A.2d 624 (Del. 1976) which held that an indigent is entitled to have the state pay for an appellate transcript even if represented by retained counsel paid for by the indigent's parents because the obligation to provide a transcript to an indigent was imposed on the state by the federal constitution. *Id.* at 879-80. But the Delaware Supreme Court determined *Pendry* was consistent with *Bailey's* holding since the federal constitution did not require funds for an investigator.

However, things have changed since *Bailey* was decided in 1981. In 1985 the Unites States Supreme Court held that fourteenth amendment due process required funds for experts for indigent defendants needing a mental health expert in an insanity case to insure meaningful access to justice. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Bailey's* holding is problematic in light of the subsequent constitutional holding in *Ake*.

Kentucky's approach is currently contrary to the predominant national thinking and is ripe for reconsideration. In ***Morton v. Commonwealth***, 817 S.W.2d 218 (Ky. 1991), the state sought the death penalty for Barrington L. Morton's killing of a drug dealer and her 5 year old son. Mr. Morton "retained" an attorney to represent him against this capital prosecution for $100, and asked the trial court to declare him indigent under KRS 31.110 so he would be able to obtain funds for expert assistance at the expense of the state. The Kentucky Supreme Court viewed these facts to implicate three aspects of the right to counsel.

The trial judge determined Mr. Morton was indigent but refused to permit him to keep his chosen counsel if he wanted to access public funds for experts. According to the Kentucky Supreme Court's decision, an indigent defendant who had retained counsel for $100 was not constitutionally entitled to have that attorney continue to represent him *pro bono* since "...the constitutional right to counsel does not embrace a right to be represented by a particular attorney." *Id.* at 220.

Secondly, the Court held that an indigent who had paid counsel $100 was not able to access expert services under KRS Chapter 31 even though that counsel was willing to continue the *pro bono* representation. *Id.*

Thirdly, the Court decided that a judge could order funds for experts under KRS Chapter 31 for an indigent who is represented in "an unusual" case by a "truly *pro bono*" counsel. *Id.* at 220-

21.

These three rulings were propelled by the Court's finding that KRS Chapter 31 required two facts to access either public counsel or public funds for ancillary services: 1) the defendant had to be "without the independent means to obtain counsel" *and* 2) there had to be the "inability to obtain necessary services." *Id.* at 220.

Perhaps the most compelling reason for the decision in *Morton* was that the Court feared a ruling otherwise would mean that most people would pay their attorneys all their money and then seek funds for non-attorney costs from the state. This would substantially increase the state's financial burden: "to do otherwise would invite defendants to impoverish themselves by payments to attorneys and have the Commonwealth pay all other costs." *Id.* at 221.

While there is no doubt that criminal defendants do in some numbers impoverish themselves to criminal defense attorneys, the much larger reality in Kentucky seems to be that attorneys agree to represent accused persons for less money than is necessary to provide competent representation. In fact, many attorneys donate the rest of the time to provide adequate representation. In other cases the client is provided something less than adequate representation. As a consequence of *Morton*, there likely will be more cases where the state is responsible for both costs: the cost of the attorney, and the cost of the ancillary services. A different ruling likely would have saved the state substantial public defense attorney fees. Clients are seldom going to risk trial with retained counsel if that means they must forfeit access to funds for experts, investigation and other services despite their real indigence.

In *Morton*, the Court has eliminated one risk to the state financial obligations and increased another larger risk to state financial responsibilities. If *Morton* is primarily motivated by what is cheaper to the state fisc, *Morton* is ripe for modification or even overruling when the costs caused by it become apparent in future litigation.

A disturbing aspect of the Court's rationale is its decision to view $100 as a real retainer for an attorney to represent an indigent charged with capital murder of an adult and child. While the court's recognition of the sanctity of the retained attorney-client relationship is impressive, it is disconcerting to see $100 viewed as a real fee. The sum of $100 does not purchase the time necessary for competent representation in a DUI case in this Commonwealth, much less for the most time consuming and complicated litigation known to the Commonwealth's criminal justice system.

Three short months later the unusual case appeared and the Kentucky Supreme Court determined that a trial judge acted properly in authorizing $14,564.72 for expert and investigator costs where the indigent murder defendant was represented by two *pro bono* attorneys. *Kenton-Gallatin-Boone Public Defender, Inc. v. Stephens*, 819 S.W.2d 37 (Ky. 1991). Relying on *Morton* the Court said: "Nothing in the statute prohibits a trial judge from approving

the payment of expenses incurred by an attorney in the defense of an indigent, regardless of whether the attorney is 'truly' *pro bono* or an appointed public defender." *Stephens, supra* at 38.

In *Commonwealth v. Lavit*, 882 S.W.2d 678 (Ky. 1994) an attorney was retained by the mother of the capital defendant for $1,000. Before trial, the private attorney successfully asked the trial judge to allow the defendant to proceed *in forma pauperis* and to appoint his current counsel and another attorney as his public defenders for purposes of the rest of the case. At the end of the case, the appointed counsel asked for $8,854 for their fee and expenses. The trial judge authorized $2,500. The Kentucky Supreme Court ordered the full fee paid since this was a case of "special circumstances" due to the nature of the case, the time involved and the complexity of the issues. Significantly, the Attorney General argued under *Morton, supra*, that the attorneys should receive no more than their $1,000 retainer. The Court rejected this argument on procedural grounds, "However, this argument was not raised at any time below, and therefore, cannot now be considered in this Court."

Lavitt, supra at 680. *Lavitt's* authorization of the fee may have implicitly overruled *Morton*. At a minimum, it altered *Morton* to authorize payment under KRS Chapter 31 when there is retained counsel in situations where there is no objection raised by the prosecutor.

Conclusion: The Client's Desire, the State Fisc, Effective Assistance

Just results through fair process is the goal of our criminal justice system. Quality representation is the criminal defense attorney's duty in this effort to achieve just results. In these times quality is defined by the customer. Prospering enterprises honor the desires of their customers ...their clients.

Recognition of that value would lead state courts to allow clients to choose retained counsel and have access to state funds for experts, investigators and resources when the defendant cannot afford those costs. This would minimize the chances that such representation will be ineffective without those resources and provide some relief to underfunded defender offices, fostering long term public policy interests which have been identified by Margolin and Wagner in *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 Hastings L.J. 647, 652 (1978) as: "(1) establishment of the defendant's innocence; (2) equality of access to justice as between the poor and the rich; (3) equality of access to justice as between the indigent defendant and the prosecutor; (4) access to that which is fundamental for a 'fair trial'; (5) access to that which assures an 'adequate defense'; (6) access to that which 'assists counsel'; and (7) access to that which assures 'effective defense.'"

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TABLE OF AUTHORITIES

American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3d ed. 1992), **Standard 5-1.4**
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Ex Parte Sanders, 612 So.2d 1199 (Ala. 1993) (Ballistics expert)
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Commonwealth v. Lavitt, 882 S.W.2d 678 (Ky. 1994) (Attorney fees)

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DPA *Morton* Policy

PUBLIC ADVOCACY POLICIES and PROCEDURES	**Policy 25.07**	**Total Pages 3**
	Original Date Issued: April 28, 1997	**Last Revision Date: April 28, 1997**
References	**Subject:25.07 *Morton* Policy**	

I. **THE LAW**

A. In Kentucky, a person eligible under KRS Chapter 31 to be represented by public defender counsel is also entitled "[t]o be provided with the necessary services and facilities of representation including investigation and other preparation." KRS 31.110(1). Even when a person is otherwise eligible for indigency status under KRS Chapter 31, that person is disqualified from indigency status, for all purposes, if he is represented by a retained lawyer who will receive any fee, regardless of the token amount involved, and regardless of the source of the fee. *Morton v. Commonwealth*, Ky., 817 S.W.2d 218 (1991). Only if the indigent person has obtained truly *pro bono* counsel, who "has neither sought nor obtained any fee or the promise thereof for legal services rendered or promised," would the client be indigent for purposes of obtaining under KRS Chapter 31 the necessary services and facilities of representation, such as expert witnesses and investigative services. *Morton, supra*.

B. The *Morton* decision acknowledges that an indigent may not be denied the statutory and constitutional right to obtain necessary services other than counsel simply because the accused has been able to retain private counsel. Instead the *Morton* opinion indicates that the indigent defendant must be allowed to discharge his or her retained counsel and then proceed with appointed counsel and claim indigency status for the purpose of obtaining other necessary services at state expense.

II. THE PRACTICAL APPLICATION OF THE LAW

A. A trial judge has the right to declare an otherwise qualified indigent person ineligible for indigency status under KRS Chapter 31, for any and all purposes, if the indigent is represented by a retained attorney who is not serving in a truly *pro bono* fashion. Such a ruling, however, would be erroneous unless the court permits the indigent person the opportunity to discharge retained counsel and elect to be represented by KRS Chapter 31 counsel. An indigent who elects to discharge his retained counsel and obtain public defender counsel would then be eligible for all the necessary services and facilities of representation. Without such a knowing and intelligent waiver on the record by the indigent, the court may not declare an indigent person ineligible for the necessary services and facilities of representation. Conversely, the court may not discharge the retained counsel of an indigent person, even where the fee is only minimal, and appoint public defender counsel to enable the indigent to have access to other services, such as defense experts and investigation assistance, without the knowing and intelligent consent of the indigent.

B. At the minimum it is incumbent upon public defender administrators, whether full-time or part-time, to take the necessary steps to insure that the *Morton* decision is interpreted and applied in this manner, even though these rulings are normally rendered in cases which do not initially involve public defender representation.

III. DEFICIENCIES IN THE *MORTON* PROCEDURE

A. Under *Morton*, an eligible person apparently has the right, due to his indigency status, to give up his retained attorney's representation and proceed under the auspices of KRS Chapter 31. When the eligible person's attorney has been paid a fee other than a token or modest sum, the discharge of that retained attorney will not only allow the discharged attorney to keep the unearned fee, but will require the Department of Public Advocacy to provide representation to the indigent as a condition precedent to granting the indigent access to other necessary services of representation at no cost to the indigent. The *Morton* procedure fails to factor into the equation both the loss of that fee to the accused or to his family and/or friends or the potential for a windfall to the retained attorney who is required to withdraw to enable the indigent accused access to state funds for reasonably necessary expenses, such as expert witnesses and an investigator.

B. In these types of situations fiscal concerns about "increas[ing] the cost to the public by abusive utilization" and "the financial burden on the Commonwealth" are neither met nor resolved by the procedure available under *Morton* to indigent persons. Indeed, the *Morton* procedure, as applied to numerous cases, will allow indigents "to impoverish" themselves "by payments to attorneys and have the Commonwealth pay all ... costs," once the indigent elects to discharge the retained counsel to obtain access to other necessary defense services.

C. The *Morton* resolution works fine in situations where the retained lawyer's fee is "so trifling as to be unworthy of consideration as any attorney fee" or "merely token," but breaks down when the retained attorney's fee is perceived as substantial. The public would look askance at a public defender system which allowed a private attorney to pocket a $15,000.00 fee from an indigent accused's family or friends, while the taxpayers would have to pay not only the costs of reasonably necessary expenses, but also the cost of public defender counsel to replace the retained criminal lawyer who has been relieved by the court.

IV. THE DEPARTMENT'S COMMITMENT TO REFINING *MORTON*

A. To insure the refinement and revisions of the *Morton* precedent through litigation, the Department of Public Advocacy, in situations where the retained counsel's fee is significant or substantial in relationship to the type of case charged, is committed to seeking the following judicial relief: (1) the indigent person with retained counsel is eligible under KRS Chapter 31 for funds to obtain the necessary services and facilities of representation, such as an investigator and expert witnesses, upon a judicial finding of the defendant's indigency and reasonable necessity for those services; (2) the Department of Public Advocacy be appointed as co-counsel or second chair to assist in the representation of the indigent person; and (3) the motion of retained defense counsel to withdraw be denied.

B. By having the Department of Public Advocacy appointed as co-counsel or second chair, the Department will be able administratively to reduce or increase its involvement depending on the amount of fee paid the retained counsel in relationship to the type of charges brought against the indigent. If, for example, the fee in a felony case was modest and the retained counsel had already expended many hours on investigation and pretrial motion practice, the Department may assign counsel to function as first chair or co-counsel. Conversely, where the retained counsel's fee in a serious felony case was substantial, the Department may assign counsel to serve as second chair, leaving the defense primarily in the hands of the already well paid retained counsel, to reduce the

cost to the public of the indigent's actual representation.

C. By requiring the retained counsel to remain on the case, neither the indigent defendant nor the public lose the knowledge and work of the retained attorney which has already been purchased by the indigent or his family and friends.

D. The Department of Public Advocacy believes that there is a good faith argument, as delineated above, for an extension, modification or reversal of the *Morton* decision. Ky. Rules of Professional Conduct, Rule 3.1, SCR 3.130. *See Leasor v. Redmon*, Ky., 734 S.W.2d 462, 464 & 466 (1987). This policy as a directive applies only to public defender attorneys when functioning in an administrative capacity and has no application as a directive to public defenders when representing indigent clients.

C. A public defender attorney assigned to represent an indigent who has elected to discharge retained counsel under *Morton* to obtain eligibility under KRS Chapter 31 is free, as a matter of strategy, to seek on behalf of the indigent reconsideration of the discharge of retained counsel, utilizing the substance of this policy.

V. NOTIFICATION OF POTENTIAL AND ACTUAL *MORTON* RULINGS

A. Any person, whether an attorney or a non-lawyer support person acting under the provisions of KRS Chapter 31, aware of a situation where a *Morton* ruling may be or has been rendered should bring this to the attention of his or her immediate supervisor who shall notify the appropriate Division Director, Trials or Post-Trial, in Frankfort.

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What Do We Know About Mental Disorder and Violence?

Source of This Information

In January 1993, the National Institute of Mental Health convened a conference of leading researchers, consumers, family members, and mental health administrators titled "Treatment of Violent Mentally Ill Persons in the Community: Issues of Policy, Services and Research." This is drawn from the information presented there, some subsequent publications, and the critiques of conference participants on prior drafts of this document The content here is not a consensus of that group, but is intended to reflect their main points of agreement.

Public Perceptions

- The belief in a strong link between violence and mental illness is firmly rooted in the minds of many U.S. citizens. Television, movies and newspapers regularly foster this view by selective and sensationalized reporting (Steadman and Cocozza, 1978).

- In a recent survey, members of the National Alliance for the Mentally III (NAMI), when asked about their experiences, consistently cited media sources (film and news stories about mentally ill criminals, in particular) as primary contributors to mental illness stigma (Wahl and Harman, 1989; Wahl, 1992).

Does Research Support the Public's Perceptions?

- In a word, NO. There is no empirical support for the strong connection the public assumes between mental disorder and violence. In fact, prior history of violence and current alcohol and drug abuse are much more accurate indications of the risk of violence.

- 1970s: Research in the 1970s began to indicate some relationship between mental illness and violence, but not for the direct, strong link presumed by the public.

- 1980s: Studies continued to show higher arrest rates for patients released from inpatient mental hospitals than for the general public. These studies, however, were inconsistent in finding any relationships between certain psychiatric diagnoses and violence, except

for substance abuse and antisocial personality disorder.

- 1990s: The recent NIMH Epidemiological Catchment Area Study estimated that about *90 percent of persons with current mental illnesses are not violent* within one year (Swanson, et al., 1990). This fact alone refutes the dominant media representation of most persons with mental illnesses. In fact, violent behavior of persons with mental illnesses represents only a minor contribution to all violent crimes.

- Link and colleagues (1992) state, "If a patient is not having a psychotic episode, or if psychiatric problems do not involve psychotic symptoms, then he or she is no more likely than the average person to be involved in violent/illegal behavior."

- However, certain types of symptoms, especially disorders in which people perceive threats against themselves, may increase the probability of risk of violence in persons with mental illnesses. "It may be that inappropriate reactions by others to psychotic symptoms are involved in producing the violent illegal behavior." (Link, 1992).

- Nevertheless, compared with the risk associated with alcoholism and other drug abuse, the risk associated with major mental disorders, such as schizophrenia and affective disorder, is small. Compared with the risk associated with the combination of male gender, young age, and lower socioeconomic status, the risk of violence presented by mental disorder is modest.

- The bottom line from recent research is that "the studies to date have shown an increased risk for violence among [certain] individuals with mental illness compared to the general population; mental illness increases the likelihood of having a violent incident." But, "the absolute risk posed by mental illness is small, and only a small proportion of the violence in our society can be attributed to the mentally ill" (Mulvey, 1994).

- "Clearly, mental health status makes at best a trivial contribution to the overall level of violence in society" (Monahan, 1992).

What are the Implications?

- Substance abuse presents much greater risks for violence than does mental disorder.

- The type and level of symptoms and disabilities are more important than diagnoses for understanding, treating, and preventing violent behavior in persons with mental illnesses.

- Violence among persons with mental illnesses may be caused by many of the same

factors producing violence in the general public (*e.g.*, people become violent when they feel threatened and when they use alcohol and drugs excessively).

- In efforts to predict and treat violence, it is important to recognize that risk fluctuates over time. Risk is not a static personality trait; violent behavior is a product of the interactions between an individual and his or her environment. The level of risk depends on many factors other than mental disorder that vary, thus increasing or decreasing risk of violence by persons with mental illnesses (Campbell, Stefan and Loder, 1994).

- Appropriate legal protections for persons receiving various forms of community supervision are necessary so that individuals' rights are properly balanced with the community's right to protection (*e.g.*, legal representation at hearings to change the conditions of community supervision).

- It is possible to identify families at risk, but the nature of effective interventions is unclear. Furthermore, we really have not asked, and therefore don't know, what preventive intervention(s) families and consumers might prefer. It may be useful to think about "risky environments" rather than "risky persons" when framing research questions.

- To the degree that support services are available, are used, and are effective, persons with mental illnesses pose no greater threat to the community than other individuals. If these elements are not in place, some persons with mental illnesses may commit violent acts that will lead to their arrest (Dvoskin and Steadman, 1994).

- Future research should not only study relevant experiences, but also examine how these experiences are interpreted by consumers and families.

- Inadequate attention has been paid by researchers to violence against people with mental illnesses.

- Intensive Case Management programs have shown considerable promise for helping the small group of persons with mental disorders who are violent. (Dvoskin and Steadman, 1994), and brief inpatient treatment or crisis stabilization services may also be warranted (Task Force on Homelessness and Severe Mental Illness, 1992).

- Future research should focus more closely on wellness models, *i.e.*, consumers whose violent behavior decreased after certain interventions occurred.

Statement on Violence by Persons With Mental Disorders

This statement was drafted by the John D. and Catherine T. MacArthur Foundation Research Network on Mental Health and the Law, under the direction of John Monahan, Ph.D., in collaboration with the National Stigma Clearinghouse.

"Mental disorder" and violence are closely linked in the public mind. A combination of factors promotes this perception: sensationalized reporting by the media whenever a violent act is committed by "a former mental patient," popular misuse of psychiatric terms (such as "psychotic" and "psychopathic"), and exploitation of stock formulas and narrow stereotypes by the entertainment industry. The public justifies its fear and rejection of people labeled "mentally ill," and attempts to segregate them in the community, by this assumption of "dangerousness."

The experience of people with psychiatric conditions and of their family members paints a picture dramatically different from the stereotype. The results of several, recent large-scale research projects conclude that only a weak association between mental disorder and violence exists in the community. Serious violence by people with major mental disorders appears concentrated in a small fraction of the total number, and especially those who use alcohol and other drugs. Mental disorders in sharp contrast to alcohol and drug abuse account for a minuscule portion of the violence that afflicts American society.

The conclusions of those who use mental health services and of their family members, and the observations of researchers, suggest that the way to reduce whatever modest relationship exists between violence and mental disorder is to make accessible a range of quality treatments including peer-based programs, and to eliminate the stigma and discrimination that discourage, sometimes provoke, and penalize those who seek and receive help for disabling conditions.

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DPA Recommendations to Task Force on Law, Violent Crime and Serious Mental Illness

RECOMMENDATION NO. 1

Kentucky Should Increase Resources For Treating Mentally Ill Prisoners While They Are In Prison And Establish Additional Community Support Programs or Transitional Facilities For Persons With Long Term Mental Illness for Persons Paroled from Incarceration.

RECOMMENDATION NO. 2

The Commonwealth should realign existing resources from expensive institutional commitment or increase resources for voluntary out-patient commitment with intensive supervision by case managers. With these realigned or increased resources, no additional changes to KRS Chapters 202A or 504 are needed to meet Kentucky's need to assure the safety of its communities.

RECOMMENDATION NO. 3

Kentucky should shift existing funds from expensive involuntary in-patient programs to cost-effective community based voluntary out-patient programs to increase long-term solutions to violence by persons with mental illness.

RECOMMENDATION NO. 4

Current statutory protections for notice are adequate for public safety.

RECOMMENDATION NO. 5

Guilty but mentally ill (GBMI) provisions should be eliminated from Kentucky statutes as they provide no useful public policy function and are misleading.

Public Protection and Regulation Cabinet Secretary Laura M. Douglas chairs the Task Force on Law, Violent Crime and Serious Mental Illness. Task Force members are: Eleanor Jordan, David L. Williams, Sheldon Baugh, Laura M. Douglas, E. Daniel Cherry, Lou Ann Thompson, Gretchen Brown, Paul Mason, Tamara Gormley, Ernesto Scorsone, and Jack L. Coleman, Jr.

The Department of Public Advocacy presented the following 5 recommendations to the Task Force:

DPA Has Longstanding Experience Representing the Mentally Ill. By statute, KRS Chapter 202A and KRS 31.100(4)(c), the defender trial and post-trial divisions of DPA are charged with the statewide responsibility to represent all those persons the state seeks to involuntarily commit. Under 42 U.S.C. 10801 *et.seq.*, the Protection and Advocacy Division (P & A) of DPA is charged with the responsibility to protect the rights of individuals with mental illness. P & A's mission statement in part is to "aggressively oppose systems change efforts that could result in reduction of rights/service options...."

No Changes Are Needed in Kentucky's statutes. Current statutes afford the Commonwealth all the tools necessary to insure that the citizens of Kentucky's communities are safe and to insure the legal and constitutional rights of the citizens of the Commonwealth who have a mental illness and who have behaved violently.

An Intensive Case Management Program Needs to be Created. A successful national method of intensive case management, which is now being piloted by the Mental Health Division of the Health Services Cabinet in 3 Kentucky locations, broadly implemented in Kentucky will meet any existing gaps in Kentucky's practices without inappropriately reducing the protections and liberties of citizens of the Commonwealth.

Summary of 5 DPA Recommendations

1. Kentucky should increase resources for treating mentally ill prisoners while they are in prison and establish additional community support programs or transitional facilities for persons with long term mental illness for persons paroled from incarceration.

2. The Commonwealth should realign existing resources from expensive institutional commitment ($14,070 per patient per year) or increase resources for more cost effective voluntary out-patient commitment with intensive supervision by case managers ($6,402 per client per year). With these realigned or increased resources, no additional changes to KRS Chapters 202A or 504 are needed to meet Kentucky's current limited need to assure the safety of its communities.

3. Kentucky should shift existing funds from expensive involuntary in-patient programs to cost-effective community based voluntary out-patient programs to increase long-term solutions to violence by persons with mental illness.

4. Current statutory protections for notice are adequate for public safety.

5. Guilty but mentally ill should be eliminated from Kentucky statutes as they provide no useful public policy function and are misleading.

DPA'S 5 RECOMMENDATIONS

Recommendation No. 1

Kentucky Should Increase Resources For Treating Mentally Ill Prisoners While They Are In Prison And Establish Additional Community Support Programs or Transitional Facilities For Persons With Long Term Mental Illness for Persons Paroled from Incarceration.

There is general concern that without adequate support, supervision, and monitoring of medication compliance, mentally ill prison releases will lapse into active psychosis and possible criminal activity. Lack of outside mental health placement facilities and intensive mental health support programs also causes the Kentucky Parole Board to be reluctant to release mentally ill prisoners.

According to the Kentucky Substance Abuse And Mental Health Directory, there are only 4 Transitional Facilities For Persons With Long Term Mental Illness in Kentucky. Geographically, these transitional facilities are widely dispersed. Even more significantly, these facilities provide transitional services for a total of only 60 long term mentally ill persons. More transitional or community supported treatment programs and treatment programs for long term mentally ill persons would ensure a successful reintegration of mentally ill prison releases back into mainstream society.

Increasing the availability and quality of mental health services in Kentucky's correctional system would improve the mental health of mentally ill prison releases. The Kentucky Correctional Psychiatric Center (KCPC -Operated by CHR, but closely associated with Corrections) is not large enough to treat the many prisoners who are profoundly mentally ill. Those severely mentally ill prisoners for whom there is no room at KCPC must be housed elsewhere. Very often they are held in the Segregation Unit at the Kentucky State Reformatory.

Under Corrections' mental health program, the mentally ill prisoners who are the most seriously

ill are placed in the most depressing and least therapeutic environment - locked in individual cells with iron bars and gates in the Segregation Unit. In Corrections' "Intensive Services Program" (ISP), almost 40% of those prisoners receiving mental health services are held in the non-therapeutic Segregation Unit. Prisoners in the ISP see a psychiatrist only once briefly each week. Mentally ill prisoners in the "outpatient" program see a psychiatrist only once a month. Kentucky's mentally ill prisoners do not receive adequate mental health treatment and often regress while in prison. When released, their mental illnesses are often more acute than when they were sent to prison.

Greater recognition of the exacerbation of a person's mental illness from imprisonment plus an allocation of more resources for the treatment of mental illness in prison and for more community-based programs or transitional treatment programs and facilities will ensure more responsible and verifiable behavior by mentally ill prison "releases."

Recommendation No. 2

The Commonwealth should realign existing resources from expensive institutional commitment or increase resources for voluntary out-patient commitment with intensive supervision by case managers. With these realigned or increased resources, no additional changes to KRS Chapters 202A or 504 are needed to meet Kentucky's need to assure the safety of its communities.

How do we most effectively intervene to reduce the risk of violent behavior fully respecting the legal and constitutional rights of individual citizens? We have several choices: 1) prison, 2) mental institution; or 3) specialized intensive, voluntary out-patient management in a community. Our societal impulse is to use the first two methods of high control in order to satisfy our fear for our safety. However, they are very expensive alternatives and seldom provide permanent long-range solutions because they most usually do not account for the inevitable fact that we cannot financially and constitutionally afford to imprison or institutionalize indefinitely. Specialized intensive case management is not only cost-effective but it is the most effective at preventing over the long haul. Implemented correctly, specialized intensive case management helps individual clients identify their patterns of behavior that lead to violence and helps them learn skills for self-control, interventions to help themselves, and have ready access to a case manager for the individualized assistance needed. Specialized intensive case management meets the gap that exists between the comprehensive human resources, including housing, work, food, medical cases, support and common sense help a person with mental illness needs.

Specialized intensive case management is the maintenance in the community of mentally ill people with a history of violence by providing those persons what they need physically, psychologically and emotionally on a continuous, not periodic, basis, to successfully manage their fear and anger permanently with non-violent skills. For a complete description of this

method of management. Joel A. Dvoskin, Ph.D., Henry J. Steadman, Ph.D., *Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community*, Hospital and Community Psychiatry, Vol. 45, No. 7 (July 1994) at 679. With training and support from a case manager, persons in this program *choose* hospitalization as an intervention when appropriate, having learned that it is a helpful alternative within the supportive context of this program. Under this voluntary approach, clients access the hospital more frequently but are hospitalized for fewer days.

The core structural principles of intensive case management are based on what is known from substance abuse relapse prevention models:

1) progressive risk reduction strategy;

2) extends beyond the mental health service system;

3) integrated into all relevant community agencies, *e.g.*, criminal justice, human services;

4) power to convene providers;

5) consumer and family help design the program.

The case managers supervising the clients have the following characteristics: they operate on an integrated team approach, with small caseloads, providing individualized assistance, longitudinally, and they are adaptable to the client's changing needs and capable of crossing the boundaries of human service bureaucracies, 24 hour response capacity, and wrap around funds for the client's social and psychological needs.

The case manager helps the client identify the patterns of violence. The manager helps the client transfer or develop the skills to deal with these risk-laden circumstances. There is a plan for relapse or predictable failures so the risk of violence to self or others is reduced. The more options the client has to deal with fear and anger, the less likely the client will handle these stressors with violence.

At $17.00 per client per diem, specialized intensive case management is dramatically less costly than Kentucky's institutional costs which can range from $270 - $497 per client per diem. No statutory changes are needed to implement this program in Kentucky only realignment of resources is needed.

Recommendation No. 3

Kentucky should shift existing funds from expensive involuntary in-patient programs to cost-effective community based voluntary out-patient programs to increase long-term solutions to violence by persons with mental illness.

Institutional Commitment Costly. It is extraordinarily expensive to house a person in a mental health institution in Kentucky. The per client per diem, yearly, and total institution costs of Kentucky's mental health institutions for the fiscal year ending June 30, 1996 are:

FACILITY	PER DIEM PER CLIENT	YEARLY PER CLIENT	TOTAL INSTITUTION COSTS
1) Western State	$270.67	$17,714.23	$21,310,217
2) KCPC*	$203.04	$5,451.19	$6,830,339
3) Eastern State	$398.47	$14,142.47	$19,926,601
4) Central State	$402.36	$14,577.99	$18,791,023
5) Hazard	$497.87	$23,568.60	$13,976,177

A total of $80,834,357 are spent yearly to house 5,745 persons (an unduplicated count) in these 5 state institutions at an overall yearly per patient cost of $14,070.38.

Out-Patient Costs are Reasonable. The estimated per client per diem cost for specialized intensive out-patient case management in Kentucky based on the experience of the 3 pilot programs is: $17.54. The yearly cost is $6,402.10.

Client Compliance. Voluntary out-patient commitment to a specialized intensive case management program will improve compliance with treatment and decrease the number of days of hospitalization but it "...remains widely under-utilized." *See* Torrey, M.D., Kaplan, J.D., "A National Survey of the Use of Outpatient Commitment," *Psychiatric Services*, Vol. 46, No. 8 (Aug. 1995) at 778, 783. (copy attached).

*KCPC costs only reflect those supplied by the Department of Mental Health and not the costs of meals, maintenance of buildings, etc. supplied by the Department of Corrections since KCPC is under their umbrella.

RECOMMENDATION NO. 4

Current statutory protections for notice are adequate for public safety.

Current protections for notice provided under KRS Chapter 202A are adequate for public

safety. Modifications such those above would only hinder individuals access to voluntary treatment, inflame public and media stereotypes, and complicate discharge planning.

There are apparently three general models for notification which might be the basis for letting individuals or communities know that a person is being released from a psychiatric hospital. All are problematic in terms of the individual patient's access to treatment and privacy.

Most problematic is the concept of community notification. One need only to examine the hysteria around Todd Ice's initial community placement to note the potential results of such proposals. Police officers and elected officials suddenly became qualified to judge an individual's dangerousness. Television crews camped across the street from Central State Hospital, hoping to get footage of the "psychotic killer" for the evening news. Neighborhood groups spread wild rumors of child molesters and murderers walking the streets in their communities. Any model of community notification, in conjunction with media stereotypes, would have similar disastrous effects on discharge planning for individuals in psychiatric hospitals.

The Victim Identification and Notification Everyday (VINE) system is a telephone system in which an individual characterizing himself as a "victim" can register a personal PIN number, a personal phone number, and receive information about an identified incarcerated inmate. The inmate's custodial status, location, parole eligibility, and sentence expiration date can be accessed. VINE is also a computerized notification system that allows persons characterizing themselves as victims to receive a phone call when an inmate is released. Attempts to contact the registered victim go on until the person is located. There are obvious problems with a parallel system of notification specific to persons in psychiatric hospitals. There is no apparent screening process to the VINE system, meaning that any individual who wants to access information could do so.

This would create a tremendous disincentive for individuals who want to discreetly access in-patient treatment and likely increase the need for involuntary commitment proceedings and forced treatment. It would also increase the probability of public histrionics such as those that took place in discharge planning for Todd Ice.

Another proposal involves individuals confined to a psychiatric hospital who have threatened others. Under this proposal, the threatened individual should automatically receive prior notice of a pending discharge. There are several problems related to the logistics of such a proposal. Under current law, treating mental health professionals can not legally release a mentally ill individual who poses a threat to others. KRS 202A.400 is clear that seeking civil commitment fulfills the "duty to take reasonable precaution to provide protection from violent behavior." Information received by mental health professionals at psychiatric hospitals is often secondhand or provided by individuals with an incentive to keep the patient held involuntarily. Notification of individuals that a involuntarily patient is being released is inherently contradictory

of the standards of KRS 202A. A hospital releasing an individual from involuntary commitment because they are not dangerous might also be notifying persons in the community of that discharge for reasons that could only relate to dangerousness.

Recommendation No. 5

Guilty but mentally ill (GBMI) provisions should be eliminated from Kentucky statutes as they provide no useful public policy function and are misleading.

The GBMI statute is "essentially meaningless and inherently confusing." *Mitchell v. Commonwealth*, 781 S.W.2d 510, 514 (Ky. 1990) (Leibson & Lambert, JJ. dissenting). A GBMI "finding is, for all practical purposes, empty of legal consequences." *Id.* at 513. By any measure, the statute is vague and not rationally designed to advance any legitimate state interest. Kentucky law has long recognized the right to present an insanity defense. *Graham v. Commonwealth*, B.M. Reports, pp. 587-597 (1855). The right is so well established that it rises to the level of a constitutional right under Sections 2 and 11 of our Constitution. See also KRS 504.020. That right is substantially negated by the GBMI statutes.

"The movement throughout the country for GBMI statutes was in response to the public out-cry that followed when John W. Hinckley, Jr., was found not guilty by reason of insanity of the attempted assassination of President Reagan... Of course, the *Hinckley* acquittal followed from the federal rule then in place burdening the prosecution with the almost impossible task of proving the negative, that the defendant was *not* insane. This illogical version of the insanity defense was never applied in Kentucky... KRS 504.120 places the burden squarely on the defendant, where it belongs, to prove his insanity. The bizarre result in the *Hinckley* case has always been only a remote possibility in Kentucky, and the Guilty But Mentally Ill statute was at best an unnecessary reaction." *Mitchell*, *supra*, at 513-14.

Proponents of the GBMI statute claim it guarantees a defendant treatment while in prison. Justice Leibson in his dissent in *Mitchell*, *supra*, at 513 stated:

> The only arguable difference is that during incarceration treatment will be provided if needed and if available. This is really a distinction without a difference because other statutes providing care for the mentally ill cover the same territory.

Additionally, any claim of treatment is simply an "illusion." See "Guilty but Mentally Ill - Statute's Promise of Inmate Treatment is Mostly an Illusion," *The Courier-Journal* (October 29, 1989). "'It simply is not true' that being found guilty but mentally ill ensures treatment in prison, said Jane Thompson, Director of the Kentucky State Reformatory's program for mentally ill inmates." See "'Guilty but Mentally Ill' Called Meaningless Verdict," *The Courier-Journal* (July 17, 1994).

The GBMI statute operates to convict defendants who would otherwise have been legitimately acquitted under NGRI. It is very confusing to the jurors. The instructions given in criminal trials fail to inform the jurors that a verdict of NGRI is required if the jurors are convinced of a defendant's legal insanity. The GBMI verdict then acts as a compromise because the promise of treatment lures jurors into returning it. Contrary to the statute, a person found GBMI is not guaranteed treatment. In essence, a fraud is perpetrated upon jurors by giving them inaccurate information. The inescapable reality is that GBMI verdicts mislead jurors and thereby ensure conviction:

> [J]urors will misuse the [GBMI] verdict as a compromise device, finding someone [GBMI] when a finding of [NGRI] might have been more appropriate; the verdict is a legal hoax or fraud, a political response to public outrage about a particular case, and it gives the illusion that something positive has been done when in reality there has been little if any change in what happens to criminal defendants pleading incapacity... Mackay, *Post-Hinckley Insanity in the U.S.A.*, 1988 Crim.L.R. 88, 92 citing Brakel *et. al*, *The Mentally Disabled and the Law* (American Bar Foundation 1985), 3rd ed., at p. 715.

See also Slovenko, *The Insanity Defense in the Wake of Hinckley Trial*, 14 Rutgers L.J. 373, 393-394 (1983):

> The GBMI verdict hoodwinks the jury in the decisional process. Given two guilty verdict options, the odds are increased that a jury will return a GBMI verdict rather than one of [NGRI]. Juries think that GBMI is a compromise or middle ground because it sounds exculpatory - 'guilty **but** mentally ill.' It would sound more condemnatory if it said 'guilty **and** mentally ill.' The verdict is not a middle ground, but can be described as a misleading distinction without a difference: it is another guilty verdict. The '[GBMI]' verdict could just as well be guilty but 'cirrhotic' or 'guilty but flat feet.' The defendant is found guilty, convicted and imprisoned. He will get special attention if he needs it, as will any other prisoner. *Id.* at 393-94.

"The GBMI verdict is predictably reducing the number of NGRI pleas as well as NGRI verdicts... [T]he GBMI verdict amounts to a disguised abolition of NGRI and gives juries an 'easy way out' to avoid grappling with difficult issues of guilt, innocence and insanity." *Id.* at 394-395.

In *Brown v. Commonwealth*, 934 S.W.2d 242 (Ky. 1996) the Kentucky Supreme Court, while determining that the case did not have sufficient evidence introduced about the effects of GBMI, nevertheless commented on its view of GBMI:

> "[T]he Legislature, with passage of KRS 504.120 -- .150, has put into place a system lacking in adequate funding, and has taken no positive measures to correct this deficiency, thus falling clearly in contravention of its own mandate for treatment of

individuals found to be GBMI. We are indeed gravely troubled by a method of punishment which appears to be nothing more than a charade, cloaked in a verdict, GBMI, which amounts to nothing more than an oxymoronic term of art." *Id.* at 245.

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Do We Need Criminal Defense Attorneys in This Hostile World?

"Lock them up quicker and longer and without the disruptive interference of a defense attorney," seems to be the roar of the day. Do we really need criminal defense attorneys who delay, raise technicalities, and who do not seek the community's best interest? Assailing defense attorneys is a dangerous popular modern day sport.

It is self-evident that judges are essential to our criminal justice system. Judges are neutral arbiters of the dispute who apply the law fairly and consistently, no matter what the political or public sentiment. Professional sports would not last long without good umpires.

It is self-evident that prosecutors are crucial to our justice system. Kentucky's Commonwealth and County Attorneys have the legal and ethical duty to seek results for our communities that are genuinely just. Our system rests on the fundamental principle that victims are not prosecutors' clients, society is the client of prosecutors. While most prosecutors understandably defer to victim preferences, the prosecutor's duty is greater than that of the individual victim. We long ago abandoned the impulse of vigilantism for the sober practice of justice. Prosecutors are not charged with obtaining convictions at all costs. Since the prosecutor represents the community, just results, not a conviction is the goal of the prosecutor.

However, it is barely evident that criminal defense attorneys and public defenders are critical to Kentucky's criminal justice system. Criminal defense attorneys represent the interests of an individual client, not the interests of society. While this concept may be counter intuitive in the public's understanding of the criminal justice context, it is crystal clear to us when we think of going to a private attorney in a civil matter where we want our individual interests from our individual perspective represented with vigor. In that civil matter, we want our interests, not society's, represented to the fullest.

Criminal defense attorneys raise what popular myth labels technicalities when in fact these so called technicalities are the rules the system has developed over decades of experience to assure fair process and reliable results. Processes like fair notice, a right to rebut evidence, enough time to prepare for complex legal work.

Most people do not appreciate the role of a criminal defense attorney in the abstract. However, people implicitly understand the importance of a criminal defense attorney when they or a member of their family is accused of a crime and is locked away. Judges don't advance the interests of the citizen-accused. Neither do prosecutors. That's not their jobs. But criminal defense attorneys do, and our decisions have integrity because all the interests are on the table

before the decisions are made. Integrity is in society's interest.

Our American justice system is heralded around the world and increasingly copied by developing democracies. It is a system that better than any other in history produces reliable results which are just, while honoring the sacredness of individual liberties. The integrity of the system is deeply dependent on the fairness of the judge, the competence of the prosecution, and the existence of criminal defense attorneys who vigorously represent individuals. When we convict citizens, we better be sure. When we sentence fellow Kentuckians, it better be punishment that is just. High performing judges, prosecutors and criminal defense attorneys inspire confidence necessary for the system to work over the long haul. We cannot do without any of them, even criminal defense attorneys.

As explained by acclaimed legal ethics expert, Monroe Freedman, in minimizing, ridiculing and attacking the zealous advocacy of criminal defense lawyers, "we not only do damage to the public interest, but we also endanger a precious safeguard that any one of us may have occasion to call upon if we should come to need our own champion against a hostile world."

Jerry Cox, President
Ky. Association of Criminal Defense Lawyers

The Kentucky Association of Criminal Defense Lawyers has as its purpose to foster, maintain and encourage a high standard of integrity, independence and expertise of the criminal defense attorney; and to strive for justice, respect and dignity for criminal defense lawyers, defendants and the entire criminal justice system consistent with the Kentucky and United States Constitutions. For membership information, contact Linda DeBord, Ex. Dir. at 3300 Maple Leaf Drive, LaGrange, Kentucky 40031; Tel: (502) 243-1418.

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Plain View

Wright v. Commonwealth
1997 WL 283384 (Ky.App. 1997)

The Court of Appeals has decided to publish this case which originally was rendered on April 4, 1997. It came to the Court on a conditional plea of guilty.

A call came to the Corbin Police that a man at a service station was carrying a concealed weapon. Offficer Helton went to the station, where a clerk told him that the person was in a nearby parking lot and that there was a woman with him. The officer approached Wright, who got out, and noticed a bulge under his coat. When asked, Wright admitted that he was carrying a gun. A frisk located the gun. After Wright was placed into the officer's car, the woman was asked to get out. Helton then searched the interior of the car, including a case and a bag which contained drugs. A police dog came and helped locate a compartment in the car which contained more drugs. Another search of the car later revealed more drugs under the dashboard.

A suppression motion was filed. Wright contended that because he had been placed in the car before it was searched and because the woman was outside of the car that the search of the car could not be justified as a search incident to an arrest. *New York v. Belton*, 453 U.S. 454 (1981) held that the interior of a car, including all containers therein, could be searched incident to a lawful arrest. Wright sought to distinguish *Belton* by using *Clark v. Commonwealth*, 868 S.W.2d 1010 (Ky.App. 1993). Significantly, *Clark* was a case in which the Court relied extensively upon Section Ten. In *Clark*, the defendant had been arrested for a traffic violation rather than a criminal offense, a factor which the Court found distinguished the case from *Belton*. Further, the Court in *Clark* found that because Clark was placed in the car, "there is no suggestion that Nutter could have gotten back to the Tempo. As such, the 'search incident' was not properly limited to the area within Nutter's immediate control, from which a weapon could be drawn..." *Id*. 868 S.W. 2d at 108. Finally, the Court distinguished *Belton* by observing that the search took 30-40 minutes after the arrest.

In the instant case, the Court was unpersuaded by *Clark*. The Court noted that in *Clark* "approximately forty minutes passed between the time of his arrest and the time the car was searched...the record does not show that an inordinate amount of time passed between Wright's arrest and Officer Helton's initial search of the vehicle."

The Court expressed its holding as follows: "*Clark* does not apply to warrantless automobile searches which are conducted contemporaenously to an arrest. Where a warrantless search of

the vehicle is conducted contemporaneously with the arrest of the vehicle's occupants, the fact that the occupants have been handcuffed and placed in the back of a police car where they have little chance of escape does not render the search invalid or any evidence seized in such a search subject ot suppression."

The Court takes pains to distinguish *Clark*. However, it is clear that the Court is stating that it does not matter that a driver is placed in a police cruiser prior to the search, even thought *Clark* explicitly relied upon that fact to distinguish *Belton*. *Clark* had remained faithful to the notion that search incident to arrest had as its primary purpose the protection of the police officer. This case cuts loose of those moorings. Finally, it is disappointing that the Court says nothing about Section Ten. *Clark* was an explicit Section Ten case. This case abandons that analysis.

United States v. Rapa
1997 WL 276416 (6th Cir. 1997)

The Sixth Circuit has issued an opinion on the open fields doctrine. While the opinion is highly fact found, it also reaffirms the Sixth Circuit's opinions regarding the scope of this doctrine recognized in *Hester v. United States*, 265 U.S. 57 (1924) and *Oliver v. United States* (1984).

Here, the Michigan Department of Natural Resources came onto Rapa's property that he was developing. This occurred on several occasions, resulted in taking samples to determine whether he was developing an area without a wetlands permit, and finally resulted in the issuance of search warrants.

Rapa contended that the 175 acre area was not an open field, was surrounded by fencing, and that his presence at the time of the entry exhibited a reasonable expectation of privacy.

The Sixth Circuit, in a 2-1 opinion, overruled the trial court and held that the 175 acres were an open field, and that the warrantless entry and seizure of samples was not unreasonable or illegal. The Court demonstrates the breadth of the doctrine: "The Supreme Courthas defined open fields so broadly that, for constitutional purposes, even property that is netierh open nor a field...can be treated as an open field...The Dow court held that even a 2000 acre industrial complex is 'more comparable to an open field' than to curtilage in which a landowner has a reasonable expectation of privacy."

The Court also rejected the defendant's distinction regarding his presence at the time of the search. "Although a landowner who is present and attempting to bar entry may have a subjective expectation of privacy, the Supreme Court has rejected 'the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate.'"

SHORT VIEW

1. *State v. Simon*, 1997 WL 270531 (Ohio App. 9 Dist.). The good faith exception does not apply to a mistake of fact made during a warrantless search. Thus, evidence located in a defendant's apartment had to be suppressed where the evidence was located in the apartment itself rather than in a public area as believed by the police."An exception to the warrant requirement is not justified here because exclusion of this evidence would sanction negligence of police officers. Suppression of the evidence at issue, therefore, promotes the deterrent purpose of the exclusionary rule."

2. *In re Angelia D.B.*, 564 N.W.2d 682 (Wisc.Sup. Ct. 6/20/97). *TLO* applies even under the circumstances of a police search of a student in the school setting. This was a question left open in *TLO*. Thus, in Wisconsin, where the school initiates the search, but has a police officer conduct it, such a search can be accomplished based upon a mere reasonable suspicion. "Although *T.L.O.* did not address this question, we conclude that an application of the *T.L.O.* reasonable grounds standard, and not probable cause, to a search conducted by a school liaison officer at the request of and in conjunction with school officials of a student reasonably suspected of carrying a dangerous weapon on school grounds is consistent with both the special needs of public schools recognized in *T.L.O.* and with decisions by courts in other jurisdictions."

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Public Advocacy Seeks Nominations

An Awards Search Committee will recommend two recipients to the Public Advocate for each of the following 3 awards for the Public Advocate to make the final selection. Contact Tina Meadows at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006; Fax: (502) 564-7890; E-mail: tmeadows@dpa.state.ky.us for a nomination form. All nominations are required to be submitted on this form by March 1, 1998.

Members of the Awards Search Committee are:

John Niland, DPA Contract Administrator, Elizabethtown, Ky.

Dan Goyette, Director, Jefferson District Public Defender's Office, Louisville, Ky.

Christy Wade, Legal Secretary, Hopkinsville Office, Hopkinsville, Ky.

Tina Scott, Paralegal, Post-Conviction Unit, Frankfort, Ky.

Ed Monahan, Deputy Public Advocate, Frankfort, Ky., Chair of the Awards Committee

The Advocate, Vol. 19, No. 5 (September 1997)

Interview With Commissioner Kelly

In late 1996, Ralph Kelly was hired to head Kentucky's new Department of Juvenile Justice (DJJ). The department was created by the Kentucky Legislature earlier in that same year. Kelly arrived in Kentucky with considerable experience in the area of juvenile justice. His career path began at a boy's home in New York City. Kelly worked his way through the ranks to the position of Director of the Division of Human Services in New Jersey. In that position, Kelly was responsible for the residential treatment programs for delinquent juveniles in the New Jersey system. Kelly's experience has been an enormous asset to Kentucky.

Commissioner Kelly arrived in Kentucky following a turbulent period in the state's juvenile justice system. Problems at some of the state treatment centers had been widely publicized. As a result of these reports, Kentucky's juvenile justice system came under intense, statewide scrutiny. Within a short period of time, actions were taken on the federal level by the Department of Justice to improve conditions at the treatment centers.

In 1995, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. Section 1997, the Department of Justice investigated five juvenile treatment centers in Kentucky and found the facilities to be deficient in several areas. Practices which caused concern were: inadequate abuse investigation procedures, improper use of isolation rooms, substandard environmental conditions which often raised issues of safety, inadequate counseling and treatment of youths, inadequate after care programs, vague and ineffective educational goals, and inadequate mental/medical health attention. Kentucky entered into a consent decree with the Department of Justice in a cooperative effort to bring the juvenile treatment centers into compliance with constitutional requirements.

In the same year, Kentucky's juvenile system suffered an attack on another front. In a federal suit, *M.K. v. Wallace*, Case No. 93-213 (E.D. Ky. 1995), a young girl filed a Section 1983 action. The juvenile stated that she had been committed to the Cabinet for Families and Children without legal representation at her adjudication. She further stated that she had not received the advice of counsel at anytime during her period of confinement. Pursuant to this suit, Kentucky entered a memorandum of agreement to provide a state-wide system of legal services to children committed to the Cabinet for Families and Children (now the Department of Juvenile Justice). The Department of Public Advocacy's Juvenile Unit is the current provider of the legal services required by the memorandum of agreement.

Commissioner Kelly, aware of the turmoil within Kentucky's juvenile system, took up the challenge of implementing change. Since taking the position, many of the Commissioner's priorities have been dictated by the terms of the federal consent decree. This burden has not prevented Kelly from implementing plans for changes which will enrich DJJ beyond CRIPA

requirements. Some of these plans were identified in House Bill 117. Identified strategies for the future include plans to create and implement programs designed to prevent delinquency, intensify follow-up plans, and expand supportive follow-up services. The bill also states that DJJ will be responsible for educating court personnel and school officials on issues related to juvenile delinquency.

Commissioner Kelly's administration has taken considerable steps towards creating policies and procedures which comply with CRIPA standards and departmental goals. Kelly's accomplishments to this date include: establishing a training academy for all staff members who will be counselors in juvenile treatment centers; hiring and training additional staff; reorganizing the entire Department of Juvenile Justice; initiating the design of additional treatment centers; revising several internal procedures involving medical and psychiatric procedures; modifying procedures involving the use of isolation rooms; and implementing plans for improving the monitoring of educational issues.

In a recent interview, the Commissioner discussed some of the department's new policies. He also took the time to explain the rationale and purpose behind some of the changes.

The Commissioner stated that the training academy had held its first graduation ceremony and that the whole training experience seemed to be positive for new and continuing staff members. In conjunction with staff training, treatment programs are being revised to make sure that staff members recognized that their primary focus should be on the youths. Kelly believes that building strong relationships between youths and staff is very important. The techniques taught in training emphasize open communication as a method for increasing the effectiveness of the treatment process. Kelly also stated that fair disciplinary procedures were another important component of treatment. All these factors work together to create a strong, youth oriented treatment program. In an effort to reinforce this treatment philosophy, counselors at treatment centers are now called youth workers.

When asked about the issue of medication, the Commissioner firmly stated that DJJ's philosophy was to avoid medicating a child unless absolutely necessary. Kelly identified severe depression or hyperactivity as circumstances where medication would be appropriate. Kelly also said that a good treatment program does not need to medicate to control a child's behavior. The rational behind this philosophy is that a child must be able to cope in a law abiding society and being medicated for life is not a feasible reality for most people. Kelly believes that the best treatment programs are designed to enable kids to function in society without medication.

The Commissioner stated that DJJ will be hiring psychologists or social workers for each facility to ensure that the juveniles will be receiving adequate mental health attention. DJJ also plans to hire a psychiatrist for each facility who will be available at least four hours per week. There will be a Mental Health Director within DJJ who will be coordinating these services. It is hoped that the combination of the new mental health standards and the increased number of mental health professionals will ensure that every youth will receive appropriate attention and services while at

the treatment centers.

Kelly believes that kids who assault staff should be taken back to court if the child has an assaultive history at the facility. Kelly feels very strongly that staff must teach the child that there are limits on the degree of rebellious behavior that will be tolerated. Kelly is in favor of prosecuting kids for assaultive behavior because everyone at a facility has the right to feel safe - including staff members.

When asked whether he planned to make treatment programs consistent across the state, Kelly explained that several treatment centers have more specific focuses. For example, Greenriver Treatment Center is run as a boot camp for boys. The Commissioner stated that the philosophy behind boot camps is to give first time offenders a short and intense treatment session with lots of discipline. Owensboro Treatment Center is going to be a program exclusively for sexual offenders. The program will have a longer period of residency than other treatment centers.

When asked if space restrictions were one of the reasons for DJJ's push to transfer some youthful offenders to adult prison, the Commissioner responded that it was primarily a staffing problem. The number of youths in the centers and on the waiting list exceeded what the current staff population was capable of handling. Kelly stated that moving public offenders with lower security classifications to group homes was an alternative that DJJ would use to reduce the treatment center population. The Commissioner also stated that the newly hired youth workers will help eliminate some of the staffing issues by decreasing the number of youths an individual worker would be responsible for overseeing.

Although the Department of Juvenile Justice has been fairly progressive about implementing change, there are several problems which are yet to be resolved. During his interview, the Commissioner discussed several issues which are hot topics between DPA's Juvenile Branch Attorneys and the Department of Juvenile Justice.

The Commissioner was aware of the juvenile branch's concerns relating to Owensboro Treatment Center. As stated above, the facility is intended for long-term treatment of sexual offenders. Youths, whose court records show that the have been committed for non-sexual offenses, are still being sent to Owensboro treatment center. Another cause for concern has arisen with the Greenriver Treatment Center. Clients at the facility continue to complain that their families are being discouraged from having visitation while the youths are in the treatment center.

The Commissioner stated that Woodsbend Youth Development Center was the only facility authorized to observe and be trained on the details of Positive Peer Culture treatment. After training, Woodsbend staff will bring their knowledge of the treatment program back to DJJ to enrich Kentucky's entire juvenile justice system. Kelly stated that Positive Peer Culture treatment was very complicated and required intensive training to be successful. Members of the juvenile branch are concerned because several treatment programs are using components

of the Positive Peer Culture approach. A number of youths have complained about the punitive aspects of the treatment program involving this treatment philosophy.

Despite the overwhelming nature of the task, the Commissioner expressed a solid confidence in attaining the goals set out for DJJ by the CRIPA consent decree and House Bill 117. He explained that DJJ had made substantial steps toward complying with the terms of the consent decree. The Commissioner speculated that within another year DJJ would be in a position to seek a dismissal of the agreement on the basis of total compliance.

The Commissioner ended the interview by stating that the Department of Juvenile Justice took physical custody of kids based upon the committing court's orders and documentation. If the documents are valid on their face, DJJ has no justification for refusing to accept custody. Commissioner Kelly said that the juvenile branch's role as legal representatives for these children provided an important service and would be needed as long as youth's constitutional rights were being ignored in juvenile courts around the state.[1]

Kelly recognizes that fairness must exist before and during commitment to the Department of Juvenile Justice. Kelly's attitude toward youths and his desire to create youth oriented, positive treatment program will play a strong role in improving the conditions of youths in the juvenile system in Kentucky.

Footnotes

[1]It should be noted that *John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992), requires states to provide incarcerated juveniles with meaningful access to courts. This means that juveniles have the right to post-adjudicatory counsel irrespective of the circumstances surrounding their initial commitment. The representation of counsel includes "affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration." *Id.* at 235.

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Only at a Distance

Reflections by Former Public Advocate, Ray Corns at DPA's 25th Annual Conference

In the hill country of Eastern Kentucky, where I grew up more or less, depending on whom you ask, we have a rural philosopher, whose mind has never been impaired by any sort of academic training. A few days ago, he was asked, "Colonel Averitt did you see the Haley-Bopp Comet?" He said, "Yes. But only at a distance." I want to think with you on that subject: "Only At A Distance."

Often, we get so overwhelmed with the duties of the day that we fail to grasp the magnitude and scope of the professional services provided across the span of years. I want to use this forum to put that service in perspective.

As you celebrate the 25th Anniversary, it's a time for **CONGRATULATIONS**. I congratulate not only you, but your spouse and family, because each has shared in the service and sacrifice.

With respect to my time with the Department, perhaps, I can be remembered like the little drummer boy, who said that he didn't make very good music, but he drowned out a lot of bad.

It's also a time for **COMMITMENT** to stay the course.

In James Bell Wright's *The Recreation of Bryan Kent*, there is a thought-provoking scene, where Bryan, age 21, a fugitive from the law, is sitting on a hillside with his Auntie Sue. Bryan says, "Auntie Sue, just a few short years ago, I had so many aims and ambitions. I was going to go as directly to their achievement as yon river in the valley runs to the sea."

With the wisdom of her years, Auntie Sue says, "Bryan, look at yon river. It doesn't run directly to the sea. It twists and turns and almost runs into the hill on the other side of the valley. It has to double back all the way before it gets out of the valley and continues on its march toward the sea. But once it starts its march toward the sea, it never turns back."

So may it be with each of you -- may you never turn back!

It's also a time for **COURAGE**.

On a beautiful Saturday morning, three professional golfers were in the clubhouse looking for a fourth member. They saw an old duffer, whom they knew to be an exceedingly poor golfer.

They said, "Let's invite him to pay for $5.00 a hole. We'll win enough to pay all the green fees."

When they approached the old duffer with the offer, he said, "You fellows are a lot better players than I. But I'll accept your offer if you'll give me two lookouts."

The professional golfers didn't know what that was. But they said, "OK. You have two lookouts."

When the first professional golfer was in midswing on the first tee, the old duffer yelled, "Lookout." Instead of driving the ball down the fairway, he pulled it at a ninety degree angle into the clubhouse parking lot.

The old duffer won all eighteen holes that day -- and he never had to use his second lookout.

Many people are like that. They are so fearful that someone will criticize, complain, or yell "lookout," that they never drive on toward the goal, but spend their lives in a clubhouse parking lot.

One person can make a tremendous difference. The Mona Lisa is not the work of a committee. The Cistine Chapel was not painted with a spray gun. The first heart transplant was not performed by the American Medical Association.

Each of these singular achievements were brought about primarily by the extraordinary dedication and devotion of one person. So, it shall be for the aeons to come.

YOU CAN BE THAT PERSON!

Lastly, it's a time for **COMMENCEMENT**. This is only the beginning of the beginning. Time is short. Time is like a circus -- always packing up and moving away. Will Rogers said, "Today's president is tomorrow's postage stamp."

The poet wrote:

> *Life is only just a minute.*
> *Only sixty seconds in it.*
> *Forced upon us; didn't seek it;*
> *Didn't choose it. Can't refuse it.*
> *But I must use it.*
> *And give account if I abuse it.*
> *Yes, it's only just a minute.*
> *But there's eternity in it.*

May you have the vision to see things as they really are; the imagination to dream great

dreams as they might be; and the courage to make those dreams come true.

If you can do these things, you will not see your service as a public advocate ***Only At A Distance***.

I conclude with this hope and wish:

Old friends are scarce.
New friends are few.
I hope today that
I've found one of each in you!

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Defending Drug Cases

The intent of this article is twofold. First, it will remind trial attorneys that drug cases are triable and contain numerous legal issues. Consequently these cases must be aggressively prepared at the pretrial stage and then actually tried by jury. Second, the format is designed to take attorneys through, step-by-step, the defense of drug cases. However, the article should not be used as a substitute for the trial attorney taking the time to exhaustively research each legal issue in a given case.

Right to Test

Defense counsel should always consider having the alleged drug examined by someone other than the prosecution's expert. *James v. Commonwealth*, 482 S.W.2d 92 (Ky. 1972), recognized a defendant's right to independently analyze the alleged drug. Subsequent cases have reiterated this right and stated "the right to testing is implicit under RCr 7.24." *Green v. Commonwealth*, 684 S.W.2d 13, 16 (Ky.App. 1984). Funding for defense testing would be covered under KRS 31.185 and 31.200.

If the drug sample was consumed in testing by the prosecution's expert then a motion to dismiss and/or a motion to suppress the results generated by the state's expert should be made. Rely in part on *Green v. Commonwealth*, 684 S.W.2d 13, 16 (Ky.App. 1984), which states, "we hold the unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged, renders the test results inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation."

Failure to move for independent testing can hurt the defense in other ways. For example, in *Sargent v Commonwealth*, 813 S.W.2d 801, 802 (Ky. 1991) the defense contended that the prosecutors had not given to the defense the laboratory reports of the marijauna. The defendant announced "ready" and "the trial judge ... [found] that the Commonwealth had substantially complied with the discovery order and that Donald Sargent had suffered no prejudice because he did not move for independent testing of the marijuana." However, three Justices in dissent stated, "in announcing ready, the defense was perfectly justified in believing that the Commonwealth had complied with the express order of the court, that there was no undisclosed scientific evidence." *Id.* at 803.

In *Howard v. Commonwealth*, 787 S.W.2d 264 (Ky. App. 1990), the Commonwealth failed to produce the marijuana which was allegedly possessed by the appellant for purposes of sale. "In

this case no marijuana was seized by the Commonwealth. Appellant was observed entering Hilltopper Billiards carrying a paper bag of sufficient size to contain a pound of marijuana. He was taped offering to sell Drake Jenkins a pound of marijuana for $1,600. Jenkins declined to buy because of the price, asking the appellant if he had any cheaper. The appellant replied that he did, but that he would have to deliver it later that evening because he didn't have the cheaper grade with him. The police did not arrest appellant at this time because of the ongoing investigation which they did not wish to jeopardize by making an arrest. As a result thereof, no marijuana was seized.... We do not, therefore, read *Jacobs* to require the Commonwealth to produce an actual physical sample of the controlled substance as that was not the issue addressed to the Court." *Id.* at 265-266.

Pretrial Motions

Suppression. Most all drug cases involve some suppression issue. Search and seizure motions should always be considered under the Fourteenth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. Additional authority can often be found under the Kentucky Rules of Evidence and should be included in any suppression motion. This article will not attempt to cover the wealth of law in this area but the trial attorney must always be alert to suppression issues.

Priors. Good aggressive defense practice requires that the defense attorney always review the validity of prior convictions. Drug cases may involve prior convictions in three different settings. They are as follows: persistent felony offender, subsequent offender, and truth in sentencing. The recent case of *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995), has made it more difficult to challenge prior convictions, at least, in cases involving persistent felony offender charges. The court in *Webb*, however, never specifically overruled *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984). *Gadd* recognized the right in Kentucky to question the validity of a prior conviction by pretrial motion.

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed 2d 274 (1969), held that there would be no presumption from a silent record of the waiver of three important federal constitutional rights, (1) the privilege against self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. *Quoting McGuire v. Commonwealth,* 885 S.W.2d 931 (Ky. 1994), the Webb court stated, "Kentucky trial courts are no longer required to conduct a preliminary hearing into the constitutional underpinnings of a judgement of conviction offered to prove PFO status unless the defendant claims 'a complete denial of counsel in the prior proceeding.' ...The appropriate remedy to challenge...[prior] guilty pleas is through a RCr 11.42 proceeding and then the respondent 'may ...apply for reopening of any... sentence [thus] enhanced.'" *Webb*, 904 S.W.2d at 229. However, in *Woods v. Commonwealth*, 793 S.W.2d 809 (Ky. 1990), the court held a prior guilty plea constitutionally defective because the court did not canvass Boykin rights with the defendant at the time of the plea even though the state rule permitted a plea of guilty in absentia prosecution for a misdemeanor.

Defense counsel should keep in mind that *Webb* was only addressing the attack on a prior used in a persistent felony offender proceeding. Therefore the Court has not specifically ruled on the issue of whether such attacks of prior convictions would be appropriate as to subsequent offenders status or in a truth in sentencing proceeding. To the extent that *Webb* is controlling in this area then defense counsel still must investigate pre-trial the validity of prior convictions which are to be used in persistent felony offender, subsequent offender, and truth in sentencing proceedings. Consideration must then be given to challenging these prior convictions by way of filing a motion pursuant to RCr 11.42. Unfortunately, effective October 1, 1994, such a motion must be filed "within three years after the judgment becomes final." If the judgment became final before the effective date of the rule then the time commenced upon the effective date of RCr 11.42.

Informant. Many drug cases involve the use of an informant. In the event that the informant is an eye witness then defense counsel is entitled to the name and address of the informant under *Burks v. Commonwealth*, 471 S.W.2d 298 (Ky. 1971). The court noted that, "the significant point is that when an informer participates in or places himself in the position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness." *Id.* at 300. The *Burks* court also noted that the "better practice [is] to raise the question by pre-trial motion ...." *Id. at 301.*

Even if the informant is not an eyewitness the defense may be entitled to the identity of the informant. In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the court discussed whether a defendant charged under federal criminal laws was entitled to the name of an informant. The court was sympathetic to the defense position and noted, "His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." *Id.* at 629.

KRE 508 specifically deals with the identity of an informer. Under KRE 508 (c)(2), "[i]f the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following: (A) Requiring the prosecuting attorney to comply; (B) Granting the defendant additional time or continuance; (C) Relieving the defendant from making disclosures otherwise required of him; (D) Prohibiting the prosecuting attorney from introducing specified evidence; and (E) Dismissing charges."

One published decision regarding identity of informants, is *Commonwealth v. Balsley*, 743 S.W.2d 36 (Ky.App. 1988) which was decided prior to KRE 508. The trial court ordered the

identity of the informant to be disclosed for two separate reasons. The informant was a material witness. Also, the court ordered disclosure because, "this Judge is not satisfied that such information was received from a reliable informant, and in my judgment, the disclosure is required." Id. at 38. The detective's affidavit in support of the search warrant "was substantially similar or exactly the same as the 35 previous affidavits submitted by this officer in search warrant applications." Id. "[T]his and other disturbing elements of the investigation" supported the trial judge's ruling.

Surveillance Privilege. Kentucky has also addressed the so called "surveillance location privilege." A trial court had precluded a defendant from questioning an officer about the officer's precise location at the time of surveillance. "Jett never demonstrated a need to know the exact location of the surveillance post. He presented no evidence that there was some reason to believe Officer Russo's view was obstructed or that the street lighting was poor at any particular vantage point. On the other hand, Officer Russo's testimony was clear and positive in identifying Jett as the person involved in these criminal activities. The officer further testified that the light and weather were good... While we conclude that a surveillance location privilege should exist in Kentucky, we recognize a need to apply it only in those cases where it is justified. We determine that the conflicting interest of need to restrict and need to know or a right to cross-examine were properly balanced in this case. Prior to trial, Jett moved to obtain the information in order to examine the location. The Commonwealth opposed the motion because it would compromise the location for future use and jeopardize the safety of the property owners... We agree with the result in this case." *Jett v. Commonwealth*, 862 S.W.2d 908, 910 (Ky.App. 1993) (emphasis added).

Defense Strategies

Lack of knowledge is a viable defense when prosecutors and police officers seek to charge everyone in a dwelling while a search warrant is being executed, all occupants of an automobile which contained drugs, or persons who happened to be on a street corner where drugs are found nearby. In *Carr v. Commonwealth*, 481 S.W.2d 91 (Ky. 1972), the evidence was insufficient to sustain the conviction of an automobile passenger. The defendant "was a passenger; he had driven the automobile on occasion; he was a friend of the [co-defendant]." There is no direct evidence that he knew the drugs were in the automobile, that he used such drugs, that he pushed or sold such drugs on this occasion or at any other time, or that he knew that the [co-defendant] did. [The defendant] is linked to the drugs by a Siamese integument leading to a two-headed body of suspicion and innocence, not a live, normal, squawling conviction. There is no direct evidence that he had possession or control of the drugs." *Id*. at 92.

Misidentification is a major defense in drug cases. Drug cases, in particular, are ripe for that defense because so many cases are a result of undercover operations and informants. Anytime there is a gap between the time of the alleged incident and the arrest then consideration must be given to the use of a misidentification defense. This defense succeeds more frequently

when used in combination with an alibi. Keep in mind that Kentucky does not require the defense to give notice of an alibi defense. Under KRS 500.070(2), "No court can require notice of a defense prior to trial time."

Lack of possession is often used in drug cases. In *Paul v. Commonwealth*, 765 S.W.2d 24 (Ky. App. 1989), four persons were in an automobile that was pulled over for speeding. The detective approached the vehicle and observed a small amount of marijuana at the driver's feet and two marijuana roaches in the dashboard ashtray. He also smelled marijuana inside the car. The defendant was sitting in the back seat on the right side and the owner of the vehicle was sitting in the front seat on the right side. "[P]erson who owns or exercises dominion or control over a motor vehicle is deemed to be the possessor of any contraband discovered inside it." *Id.* at 26. "[A] person's mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy... The probable cause requirement is not satisfied by one's mere propinquity to others independently suspected of criminal activity." *Id*. The denial of the motion to suppress was reversed and the case remanded.

In *Leavell v. Commonwealth*, 737 S.W.2d 695 (Ky. 1987), there was evidence that the defendant was in possession of the ignition key to an automobile which had 90 pounds of marijuana in the trunk. The evidence supported a finding that the defendant was in constructive possession of the marijuana, notwithstanding the fact that the key he had would not open the doors or trunk of the car. The owner of the car who had given the defendant the key testified that it was his intention to transfer possession of the marijuana over to the defendant and that they had used this method of transfer on previous occasion. "The person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband." *Id. at 697.*

The court held in *Coker v. Commonwealth*, 811 S.W.2d 8 (Ky.App. 1991), that the evidence was insufficient to sustain the co-defendant's conviction for trafficking in cocaine or possession of drug paraphernalia. She was not named in the search warrant or the affidavit supporting the search warrant. The "evidence fell well short of establishing that this appellant exercised dominion and control over the premises at the time they were searched and the evidence seized." *Id*. at 10.

In another case, *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky.App. 1993), the court found that it was not clearly unreasonable for a jury to believe that the defendant constructively possessed cocaine which was found in her house, although a co-defendant claimed ownership of the cocaine and said it was for his personal use only. Three ounces of cocaine were found in the defendant's kitchen and bathroom, measuring scales and baggies were found in the kitchen, over $11,000 was found in the defendant's purse, police detectives testified that cocaine is generally sold on the street in quantities of one gram or less, handguns and ammunitions were found in the home, and the defendant possessed unexplained wealth. *Id*. at 202.

No one was on the premises when a search warrant was executed in *Hargrave v. Commonwealth*, 724 S.W.2d 202 (Ky. 1987). It was the defendant's home and a week after the search the defendant turned himself in to the police. "'Possession' sufficient to convict under the law need not be actual; 'a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion or control.'" *Id*. at 203.

In *Rupard v. Commonwealth*, 475 S.W.2d 473 (Ky. 1972), "[t]he circumstances presented in this case support a rational inference that these appellants had constructive possession and probably actual possession of the marijuana which was found in the abandoned farmhouse. The owner of the house testified that he had not authorized either of the appellants to use the house. One of the officers saw the appellants go upon the porch of the house as if to enter; both of the officers saw the appellants coming from the direction of the house to their car and noted that one of them appeared to be deeply affected as if under the influence of a narcotic. Marijuana was found in their automobile in plain view. When the officers returned to the house, they discovered that another batch of marijuana had been bagged and the scales had been moved from the position where the officers had seen them earlier. The circumstances suffice to support the rational inference that these appellants indeed had dominion and control of the marijuana in the abandoned house; hence, it was appropriate for the trial court to admit the contraband material into evidence." *Id. at 475-476.*

There was a two story building containing a club on the first floor and an apartment on the second floor in *Dawson v. Commonwealth*, 756 S.W.2d 935 (Ky. 1988). A search revealed a number of pills in the apartment area. The defendant claimed to have moved several months earlier. The court held the defendant "exercised dominion and control over the premises sufficient to establish constructive possession." *Id.* at 936. The search revealed 1) numerous letters addressed to the defendant, 2) identification card with his picture, 3) insurance papers in his name and bills belong to him, 4) male clothing and 5) water and electricity, telephone, cable TV and postal service registered in his name. The gas bill was transferred to the name of a co-defendant five months after the defendant claimed to have moved from the apartment. There was also testimony that the defendant regularly left the club between 4:30 and 4:45 a.m. even though the bar was closed and no one else was there at those times.

In *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky. App. 1992) the court held "that the definition of possession set forth in KRS 500.080 (14) is the proper definition to be contained in the jury instructions for cases arising under KRS 218A." *Id.* at 910. The court recognized that the "instruction actually given by the trial Court appear[ed] to authorize conviction because the items in questions were *possibly* within the Appellant's constructive possession, rather than *actually* being within his dominion and control. The definition of constructive possession given under KRS 500.080 (14) clearly sets forth the actual dominion and control requirement." *Id.*

Possession v. Trafficking. In many drug cases the issue is possession versus trafficking. Numerous possession charges, depending on the drug in question, are misdemeanors. Conviction on a misdemeanor avoids a felony record, prison time, and a persistent felony

offender charge. The search of an apartment in *Dawson v. Commonwealth*, 756 S.W.2d 935 (Ky. 1988), yielded 19 Demorals, 12 Percodans, 18 Talwins and 4 Valiums. The Talwin tablets were in the ceiling. "The number of pills which constitute a quantity that is inconsistent with personal use has not been legally or medically defined." *Id.* at 936. "Here there was a large quantity of drugs not found in any labeled prescriptions container with the Talwin tablets concealed behind aluminum foil covering the ceiling. The mere possession of several controlled substances not in prescription containers is sufficient to sustain a charge of unlawful possession of a controlled substance. The fact that some of the controlled substances were in nightstands and other easily discernible places but one substance was secreted and hidden in a cache in the ceiling is so incongruous as to justify a jury to believe that the particular substances was possessed, not for personal use, but for the purpose of sale." *Id.* at 936.

The court found the evidence sufficient to support a conviction for cocaine trafficking in *Green v. Commonwealth*, 815 S.W.2d 398 (Ky. 1991). "In the course of the arrest, the black pouch was discovered several feet from him. It contained $75 and 35 small bags of cocaine. Although only one of the arresting officers actually saw the pouch fall from appellant's hand, such evidence was sufficient to create an issue of fact for the jury." *Id.* at 399.

In *Faught v. Commonwealth*, 656 S.W.2d 740 (Ky. 1993), "the seizure from appellant of 4.7 grams of cocaine, and apparatus used to sift cocaine, and a bag of Manitol together with Detective Bledsoe's testimony that cocaine is normally sold by the gram sufficiently raises a jury question of whether appellant possessed the cocaine with intent to sell." *Id.* at 742.

The court affirmed a trafficking conviction in *Brown v. Commonwealth*, Ky.App., 914 S.W.2d 355 (1996). The defendants had large quantities of cash and pagers and one defendant had a gun, rolling papers, and false identification. The 20 rocks of cocaine was sufficient to get the case to the jury.

In marijuana cases a presumption can be found in KRS 218A.1421 (5). That statute states, "the unlawful possession by any person of eight (8) or more ounces of marijuana shall be prima facie evidence that the person possessed the marijuana with the intent to sell or transfer." Notwithstanding this statute defense counsel must keep in mind that the jury is never informed of the presumption. The presumption merely allows the Commonwealth to meet its burden of overcoming a motion for a directed verdict of acquittal so that the case can be submitted to the jury.

Definitions for "sell," "traffic," and "transfer" can be found in KRS 218A.010 (22), (24), and (25).

As shown by the aforementioned cases, quantity is an important factor in the argument to a jury that the drugs in question were possessed for personal use and not for sale.

Quantity. Apart from being a major factor in determining possession versus trafficking, the

quantity in question is not significant other than in marijuana cases. In *Commonwealth v. Shivley*, 815 S.W.2d 572 (Ky. 1991), "A state forensic chemist testified at the hearing that the test tube and pipe contained cocaine. The residue could not be accurately weighed, but it was stipulated that a sufficient amount of the residue remained available for testing." *Id.* The trial court adopted the reasoning of the California Supreme Court and applied "usable quantity" approach. The Supreme Court held that "[n]either statute determines any amount of cocaine which may be possessed legally. Cocaine residue is, in fact, cocaine and we find no argument to the contrary." *Id.* at 573. "[P]ossession of cocaine residue (which is cocaine) is sufficient to entitle the Commonwealth's charge to go to a jury when there is other evidence or the inference that defendant knowingly possessed the controlled substance." *Id.* at 574.

Penalties are different under KRS 218A.1421 for trafficking in marijuana depending upon whether the quantity is less than 8 ounces, 8 ounces or more but less than 5 pounds, or 5 pounds or more.

Entrapment/outrageous police conduct is often times a viable defense in drug cases. As to state law on entrapment, one needs to consult KRS 505.010 for the specific elements. The entrapment defense was addressed in *Fuston v. Commonwealth*, 721 S.W.2d 734 (1986). "[A]ppellant testified the informant came to his house 'pretty near' for about a week and a half and called him on the telephone frequently 'to talk me into doing it'." *Id.* at 735. The trial court instructed on entrapment as to the detective but not the informant. "However, in addition to the previous sales to the undercover officer, the appellant admitted that he had made 15 or 20 other sales of small quantities of marijuana '[w]ithin the last three months, probably. '...Our statute reflects the view that the defense of entrapment is available only in those instances in which a police officer or his confederate implants in the mind of an innocent person, the disposition to violate the law, not in those instances in which a person already having in mind to violate the law is induced to do so again." *Id.* Other cases on the entrapment defense in state court are as follows:

1) *Armstrong v. Commonwealth*, 517 S.W.2d 233 (Ky. 1975),
2)*Schmidt v. Commonwealth*, 508 S.W.2d 716 (Ky. 1974),
3) *Dumond v. Commonwealth*, 488 S.W.2d 353 (Ky. 1973), and
4)*Shanks v. Commonwealth*, 463 S.W.2d 312 (Ky. 1971).

The entrapment defense may also be supported by federal constitutional law. In *U.S. v. Russell*, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), the court addressed the entrapment defense. "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous the due process principles would absolutely bar the government from invoking judicial processes to obtain the conviction, c.f. *Rochain v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the instant case is distinctly not of that breed." 411 U.S. at 431-432, 93 S.Ct. at 1643.

Insanity. Another possible defense in a drug case is an insanity defense. A leading case in this area is *Tate v. Commonwealth*, 893 S.W.2d 368 (Ky. 1995). In that case the defendant was convicted of possession of a controlled substance, robbery and of being a persistent felony offender. The issue addressed by the court was "whether drug addiction is a mental disease, defect or illness for purposes of KRS 504.020." *Id.* at 369. "We hold that a mere showing of narcotics addiction, without more, does not constitute 'some evidence' of mental illness or retardation so as to raise the issue of criminal responsibility, requiring introduction of the experts controversial testimony or an instruction to the jury on that issue. Due to the fact that *no evidence was presented that Tate was in need of a fix at that time*, there was an absence of the requisite evidence that at the time of the act charged. Tate had an abnormal condition of the mind which substantially impaired his behavior. In this case, the weight of the evidence was to the contrary as appellee's attempts to obtain money legally and the arresting officers' testimony showed appellee's lucidity at time of arrest." *Id.* at 372 (emphasis added). "Therefore, the trial court did not err in excluding Dr. Pelligrini's testimony on the grounds of lack of relevancy as no *probative* evidence was offered which a jury could reasonably infer that at the time of the criminal act, *as a result of mental illness or retardation*, appellee lacked substantial capacity to either appreciate the criminality of his acts or to conform his conduct to the requirements of law." *Id.* at 373.

Trifurcated Procedure

In *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1996), the Supreme Court approved of trifurcated procedure in which defendant in drug case was first convicted of drug offenses under instruction which made no reference to penalty. Defendant was then determined to be PFO and only after defendant was found guilty of drug charges and PFO status, jury was informed of range of penalities. (Parties stipulated that trafficking charges were subsequent offenses.) Such procedure reduced risk of undue prejudice during guilt phase of drug trial. The *Peyton* court built on the reasoning found in *Dedic v. Commonwealth*, Ky., 920 S.W.2d 878 (1996). In *Dedic* the court held that evidence of previous DUI conviction could not be introduced until guilty verdict was rendered on underlying charge.

Double Jeopardy

The Kentucky Supreme Court recently overruled *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990) in *Commonwealth v. Burge*, Ky., ___ S.W.2d ___ (1997). The court held that double jeopardy violations are to be determined by using "elements" test of *Blockburger v. United States*, 284 U.S. 294, 52 S.Ct. 180, 76 L.Ed. 306 (1932) which is codified by KRS 505.020(1)(a) and (2)(a).

In *Dishman v. Commonwealth*, Ky., 906 S.W.2d 335 (1995), Supreme Court held there was no double jeopardy bar to convicting defendant for trafficking in cocaine and criminal syndicate.

In *Carter v. Commonwealth*, 782 S.W.2d 597 (Ky. 1990), the jury returned a verdict on both trafficking and possession of LSD. The trial court advised the jury to correct the verdict and convict on only one. "Applicable double jeopardy principles do not preclude Carter's *conviction* for both offenses, only his *punishment* for both." *Id.* at 601. "The trial court could have simply set aside the verdict for the lesser offense." *Id.* at 602.

Police Officer Testimony

Several cases hold that a police officer can be an "expert." These cases, of course, open up the door to the defense obtaining an expert as well. If the client is indigent then expert assistance can be sought under KRS 31.185 and KRS 31.200. Additionally the Commonwealth must lay a proper foundation in each case to qualify the police officer as an expert.

The defense can argue under RCr 7.24 that the defense is entitled to the expert's opinion before trial.

Kroth v. Commonwealth, 737 S.W.2d 680 (Ky. 1987), allowed a police officer to testify that "a large quantity indicated that they were for sale, not personal use, based on his ten years of experience as a narcotics officer." Id. at 681.

In *Howard v. Commonwealth*, 787 S.W.2d 264 (Ky. App. 1990) the trial court allowed a detective to "testify concerning the meaning of certain words used in the conversation between appellant and Jenkins on the theory that they were using 'drug language' not readily understood by the average juror.... We find nothing wrong with the Commonwealth presenting evidence interpreting drug language as it assisted the jury in understanding the taped conversations." *Id.* at 265.

Two police officers were allowed to testify as experts that it was their opinion that the nearly 15 pounds of marijuana seized were for sale not for personal use in *Sargent v. Commonwealth*, 813 S.W.2d 801 (Ky. 1991). Three justices in dissent stated, "such testimony constitutes an egregious usurpation of the function of the jury. Rather than perpetuating the flawed holding in *Kroth v. Commonwealth*, Ky., 731 S.W.2d 680 (1987), we ought today to seize the opportunity to overrule it." *Id*. at 803. In *Cooper v. Commonwealth*, 786 S.W.2d 875 (Ky. 1990), the court allowed a police officer to testify that the location of a drug transaction was within 1000 yards of a school. The court noted that the officer's testimony was not challenged.

Instructions

Instructions in the case of *Morrison v. Commonwealth*, 607 S.W.2d 114 (Ky. 1980) allowed the jury to convict the defendant if she "knew or could have known" that the prescription was forged. Id. at 115. "The phrase 'could have known' is to nebulous and all-inclusive and there is no conceivable way that its inclusion could be justified under the statute." Id. The judgment was

reversed. As previously discussed, the case of *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky.App. 1992), adopts the definition of possession as set forth under KRS 500.080 (14) for cases arising under KRS Chapter 218A.

Severance

In *Harris v. Commonwealth*, 869 S.W.2d 32 (Ky. 1994), a defendant was charged jointly in one count with a co-defendant for trafficking in cocaine. The co-defendant was also charged with a second separate trafficking offense. The trial judge denied the motion for severance. In reversing the conviction, the appellate court stated, "knowing that there was evidence that Harris had trafficked in narcotics on a different occasion made it more likely for the jury to infer that the allegation against Walker were true. We believe that this association demonstrated prejudice against Walker, and therefore reverse." *Id.* at 34.

In *Brown v. Commonwealth*, Ky.App., 914 S.W.2d 355 (1996), co-defendant's motion for separate trial in drug trial was denied. Affirming the conviction the Court held that the co-defendant had to demonstrate likelihood of prejudice to trial court which then resulted in abuse of discretion by that Court.

Chain of Custody

In *Commonwealth v. Hubble*, 730 S.W.2d 532 (Ky. App. 1997), the court made clear that "the Commonwealth has the burden of identifying and tracing the chain of custody from the defendant to its final custodian." *Id*. at 534. In *Faught v. Commonwealth*, 656 S.W.2d 740 (1983), the court was "satisfied that the substances introduced at trial were taken from appellant's possession and that the Commonwealth satisfied its burden of proving the evidence was securely stored under reliable procedures in storage facilities provided for that purpose." *Id*. at 741.

Closing Argument by Prosecutor

The prosecutor in *Whisman v. Commonwealth*, 667 S.W.2d 394 (Ky.App. 1994), made remarks about drug dealers in the community and the abuse of drugs by children. "While these remarks give a first-blush impression of being improper because there is no factual basis for them in the record, we cannot give any in-depth consideration because they were not objected to, so they were not preserved for appellate review." *Id*. at 398 (emphasis added).

Court's Discretion to Void Conviction

Under KRS 218A.275(9) an individual "convicted for the first time of possession of controlled substances" can ask the court to later set aside and void the conviction. A similar statute for possession of marijuana is KRS 218A.276 (8). Furthermore, KRS 218A.010 (21), states that

"[f]or the purposes of [second or subsequent offense] a conviction voided under KRS 218A.275 or 218A.276 shall not constitute a conviction under this chapter." In order to take away the court's discretion then defense counsel should make voiding of the conviction part of the plea bargain.

Other Considerations

Facilitation. In *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995), the Court held that it was reversible error not to instruct jury on facilitation to trafficking in controlled substance.

Collateral Activity. Kentucky law continues to firmly discourage the use of collateral criminal activity at trial in any case, including drug cases. In *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky. App. 1992), "[i]f appellant had been charged with trafficking in cocaine, the evidence concerning the alleged drug transactions in Tennessee would obviously be relevant. However, since the appellant was charged with mere possession of cocaine, the only transaction with any possible relevance to that charge was the last one, which occurred within a week of the date of the seizure, if the evidence shows that it was cocaine that was seized. ...We find that the appellant's motion in limine should have been sustained, with the possible exception of the last transaction." *Id.* at 911.

The court in *Jett v. Commonwealth*, 862 S.W.2d 908 (Ky.App. 1993) held that "[i]t is within the sound discretion of the trial judge to determine whether the probative value of evidence is outweighed by its possible prejudicial effect and to be admit it or exclude it accordingly" in reference to cash and a beeper that the defendant was carrying when he was arrested. *Id.* at 911. The court further found that it was appropriate for the trial court to admonish the jury when a police officer referred to the defendant in testimony as a drug dealer.

In *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky. App. 1993), the court noted that the possession of a large amount of money by itself is not an indicia of criminality, but under the circumstances of the case, its introduction into evidence was proper. Furthermore, police officers executed a search warrant for drugs, and videotaped the scene and seizure of cash, guns and drugs. While upholding the admissibility of the videotape the court pointed out that the same standard applies which governs the admissibility of photographs. The introduction of such evidence requires the trial court to consider whether the probative value of the evidence outweighs its prejudicial effect.

Enhancement. A prior conviction for possession of marijuana cannot be used to enhance subsequent offenses of trafficking in cocaine and marijuana. See *Woods v. Commonwealth*, 793 S.W.2d 809 (Ky. 1990). "Second or subsequent offense" is defined by KRS 218A.010(21).

In *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1996) the defendant was sentenced to 10 years on trafficking in Schedule II controlled substance - cocaine. The sentence was enhanced

to 30 years under PFO statute and sentence as subsequent drug offender was run concurrently. Court held that defendant cannot be sentenced under both PFO and subsequent drug offender provisions. She could only be sentenced under one or the other statute.

Child Abuse. In *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993), the defendant was convicted of possession of a controlled substance, possession of drug paraphernalia and criminal child abuse. "The General Assembly intends no additional criminal punishment for the pregnant woman's abuse of alcohol and drugs apart from the punishment imposed upon anyone caught committing a crime involving those substances." *Id*. at 284. The criminal abuse conviction was vacated.

School. In *Sanders v. Commonwealth*, Ky. App., 901 S.W.2d 51 (1995), it was held that a junior college is a "school" within the meaning of KRS 218A.1411.

Tapes. The court in *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky.App. 1994) reiterated that it is within the discretion of the trial court to determine whether tape recordings should be excluded due to the quality of the sound.

Separation of Witnesses. In *Humble v. Commonwealth*, Ky.App., 887 S.W.2d 567 (1994), the trial court allowed a narcotics detective to sit at counsel table with prosecutor during drug trial. The court found no violation of RCr 9.48 or KRE 615.

Paraphernalia. Many times defendants are charged with possession of drug paraphernalia along with other charges. A first offense is a class A misdemeanor. Any plea bargain should be structured to avoid a guilty plea to the charge of possession of drug paraphernalia since a subsequent offense of possession of drug paraphernalia will be a class D felony. See KRS 218A.500(5).

Waiver of Dual Representation. Co-defendants in drug case were represented by same attorney in *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1966). Failue to comply with RCr 8.30 is presumptively prejudicial. Court requires reversal of conviction if there is nothing in the record to indicate co-defendants were given notice of potential confict or that waiver of dual representation was entered.

Firearm. 1) Being "in possession of a firearm" while violating KRS Chapter 218A results in penalty enhancement. See KRS 218A.992. Sentence enhancement does not occur for violation of KRS 218A.210, possession of controlled substances while not in the original container.

2) In *U.S. v. Gonzales*, 117 S.Ct. 1032 (1997), 18 U.S.C. 924(c) was construed to require the federal mandatory minimum sentence authorized by that statute (5, 10 or 30 years) to be served consecutively with any other sentence growing out of the same incident, regardless of the court in which the other sentence(s) were imposed. If you have a client on any charge

arising from a transaction that can result in a federal drug charge that can result in imposition of the mandatory minimum penalty under 18 U.S.C. 924, you must take into account that regardless of the good deal you might work out in the Kentucky state court.

Forfeiture. Real property may not, consistent with the fifth amendment's due process clause, be seized pursuant to a civil drug forfeiture statute [21 U.S.C. 881 (a)(7)] until the property owner has been given notice and an opportunity to be heard, unless the government is able to demonstrate exigent circumstances establishing the need for an immediate seizure of the property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Conclusion: Preparation

Nothing can substitute for preparation in trial work. In particular, drug cases have numerous factual and legal issues that require research and aggressive pretrial motion practice. This pretrial work coupled with the fact that drug cases are triable cases by their very nature leads one to the inescapable conclusion that favorable results at trial can be obtained in drug cases for our clients.

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Table of Cases

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Blockburger v. United States, 284 U.S. 294, 52 S.Ct. 180, 76 L.Ed. 306 (1932)

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)

Brown v. Commonwealth, Ky.App., 914 S.W.2d 355 (1996)

Burks v. Commonwealth, 471 S.W.2d 298 (Ky. 1971)

Carr v. Commonwealth, 481 S.W.2d 91 (Ky. 1972)

Carter v. Commonwealth, 782 S.W.2d 597 (Ky. 1990)

Clay v. Commonwealth, 867 S.W.2d 200 (Ky.App. 1993)

Coker v. Commonwealth, 811 S.W.2d 8 (Ky.App. 1991)

Commonwealth v. Balsley, 743 S.W.2d 36 (Ky.App. 1988)

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Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993)

Cooper v. Commonwealth, 786 S.W.2d 875 (Ky. 1990)

Dawson v. Commonwealth, 756 S.W.2d 935 (Ky. 1988)

Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996)

Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995)

Dumond v. Commonwealth, 488 S.W.2d 353 (Ky. 1973)

Faught v. Commonwealth, 656 S.W.2d 740 (1983)

Fuston v. Commonwealth, 721 S.W.2d 734 (1986)

Green v. Commonwealth, 684 S.W.2d 13, 16 (Ky.App. 1984)

Green v. Commonwealth, 815 S.W.2d 398 (Ky. 1991)

Hargrave v. Commonwealth, 724 S.W.2d 202 (Ky. 1987)

Harris v. Commonwealth, 869 S.W.2d 32 (Ky. 1994)

Howard v. Commonwealth, 787 S.W.2d 264 (Ky.App. 1990)

Humble v. Commonwealth, Ky.App., 887 S.W.2d 567 (1994)

Ingram v. Commonwealth, 801 S.W.2d 321 (Ky. 1990)

James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972)

Jett v. Commonwealth, 862 S.W.2d 908 (Ky.App. 1993)

Kroth v. Commonwealth, 737 S.W.2d 680 (Ky. 1987)

Leavell v. Commonwealth, 737 S.W.2d 695 (Ky. 1987)

McGuire v. Commonwealth, 885 S.W.2d 931 (Ky. 1994)

Morrison v. Commonwealth, 607 S.W.2d 114 (Ky. 1980)

Norton v. Commonwealth, 890 S.W.2d 632 (Ky.App. 1994)

Paul v. Commonwealth, 765 S.W.2d 24 (Ky.App. 1989)

Peyton v. Commonwealth, Ky., 931 S.W.2d 451 (1996)

Powell v. Commonwealth, 843 S.W.2d 908 (Ky.App. 1992)

Rochain v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)

Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)

Rupard v. Commonwealth, 475 S.W.2d 473 (Ky. 1972)

Sanders v. Commonwealth, Ky.App., 901 S.W.2d 51 (1995)

Sargent v Commonwealth, 813 S.W.2d 801, 802 (Ky. 1991)

Schmidt v. Commonwealth, 508 S.W.2d 716 (Ky. 1974)

Shanks v. Commonwealth, 463 S.W.2d 312 (Ky. 1971)

Tate v. Commonwealth, 893 S.W.2d 368 (Ky. 1995)

U.S. v. Gonzales, 117 S.Ct. 1032 (1997)

U.S. v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973)

United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993)

Webb v. Commonwealth, 904 S.W.2d 226 (Ky. 1995)

Whisman v. Commonwealth, 667 S.W.2d 394 (Ky.App. 1994)

Woods v. Commonwealth, 793 S.W.2d 809 (Ky. 1990)

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Legislative Research Commission Internet Information

A great deal of information is available on the Kentucky Legislature Home Page at http://www.lrc.state.ky.us/home.htm.

Below is just some of what can be found there:

- Kentucky Constitution
- Statute Revision Information
- General Information about Statute Codification and Revision in Kentucky
- Normal Effective Dates for Past Legislative Sessions
- Official Editions of the Kentucky Revised Statutes
- Materials from the 1996 Regular Session of the Kentucky General Assembly
- Current Versions of Bills and Resolutions

Schedules and Visitor Information

- Legislative Calendar
- Visitor Information
- Regular session schedule
- Interim committee meeting schedule
- Monthly Committee Meetings for 1997-98 Interim

Legislation

- 1998 Prefiled Bills - summaries and committee referrals
- Orders of the Day House or Senate
- Text of 1996 Bills and Resolutions

Who's Who and How to Contact Them

- Toll free phone numbers
- House Leadership
- Senate Leadership
- Electronic Mail (E-Mail) Address List for House and Senate Members.
- House Members - alphabetical.
- Senate Members - alphabetical.

- Finding Your Legislators - by county.

The Legislative Process

- Conduct of legislative business (Legislative sessions, Legislative districts, and Terms of office)
- House Rules
- Senate Rules
- Kentucky's Budget Process
- Interim periods between sessions
- How a bill becomes law
- Glossary of legislative terms
- How to trace the legislative history of a law

Organization and Administration

- Information about Committees
- Interim, Statutory, and Special Committees
- 1997 Standing Committees
- The Legislative Research Commission (LRC)
- Continuing Legal Education.

Other Kentucky General Assembly or LRC Resources

- Economic and Demographic Data
- Kentucky Statewide Summary Information
- 1990 Census Profiles
- 1992 Census of Agriculture Summary
- Kentucky County Profiles (select a county from a map)

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DPA Personnel Changes

NEW ARRIVALS

Peyton Reynolds joins DPA as an Assistant Public Advocate in our Hazard Trial Office. He is a former Commonwealth Attorney for Letcher Co.

Dana Bias joins DPA's Capital Trial Branch as an Assistant Public Advocate. She is a former staff attorney with the Jefferson District Public Defender Office.

Shelly Fears joins DPA's Appeals Branch as an Assistant Public Advocate. She is formerly a private attorney in Louisville.

Brett Sparks joins DPA's Law Operations Branch as a systems technician. He came to DPA from the private sector where he was a computer consultant and owned his own business.

Jennifer Word returns to DPA as a mitigation specialist with the Capital Trial Branch.

Renie Schuble joins DPA's Capital Post-Conviction Branch as a mitigation specialist. She received her B.S. in social work from U.L.

Valerie Boyce joins DPA's Capital Post-Conviction Branch as a mitigation specialist. She received her B.S. in social work from U.K.

Brenda Popplewell joins DPA's Appeals Branch as an Assistant Public Advocate. She was formerly with the Attorney General's Office.

John Palombi joins DPA's Appeals Branch as an Assistant Public Advocate. He is formerly an Assistant Appellate Defender in Illinois.

DEPARTURES

Mike Jarman left DPA's Covington Office as an investigator and transferred to Natural Resources.

Elizabeth Isaacs, Assistant Public Advocate with DPA's London office resigned July 31, 1997.

Julia French, Advocate Specialist with Protection & Advocacy retired August 1, 1997

Kathy Rodgers, Legal Secretary with Protection & Advocacy accepted a position in the private sector.

Bruce Leasure, Assistant Public Advocate with DPA's Paducah Office resigned June 30, 1997.

Brian Throckmorton, DPA's Librarian, resigned July 15, 1997 and accepted a position at the Lexington *Herald-Leader*.

Janet Jewell, Legal Secretary with DPA's Law Operations Branch resigned July 29, 1997.

INTERNAL TRANSFERS

Gary Sparks, Investigator, transferred from DPA's Morehead Office to the Stanton Office.

John Nelson, Assistant Public Advocate, transferred from DPA's Pikeville Office to the Stanton Office.

Ginger Massamore, Assistant Public Advocate, transferred from DPA's Paducah Office to the Henderson Office.

Melissa Bellew, Assistant Public Advocate, transferred from DPA's Stanford Office to the Elizabethtown Office.

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Dan Goyette: Recipient of Prestigious ABA Dorsey Award

Daniel T. Goyette received the Dorsey Award during ceremonies at the annual meeting of the American Bar Association in San Francisco on August 1, 1997. The prominent award, which is presented annually to an outstanding public defender or legal aid lawyer, is named in honor of the late Charles H. Dorsey, Jr., long-time Executive Director of Maryland's Legal Aid Bureau, Inc. The award is sponsored by the Government and Public Sector Lawyers Division of the ABA.

"Dan is recognized and looked upon as a voice of reason and compassion in our state and in our particular legal community," commented LBA President Margaret E. Keane in her letter of nomination to the ABA. "He speaks on behalf of those who would otherwise go unheard, and he does so quite eloquently."

The award was presented by Judge Brenda Murray and John Copelan, Chair and Vice Chair, respectively, of the ABA Government and Public

Sector Lawyers Division. It was inscribed: "In re-cognition of his exemp-lary legal career and his lifetime devotion to equal justice under the law."

Goyette is the Jefferson County Public Defender and has served as Executive Director of the Louisville-Jefferson County Public Defender Corporation since 1982. He is past president of both the Louisville Bar Association and the Louisville Bar Foundation and currently serves on the boards of both organizations.

Dan and his office were the recipients of the 1994 Department of Public Advocacy *Gideon* award.